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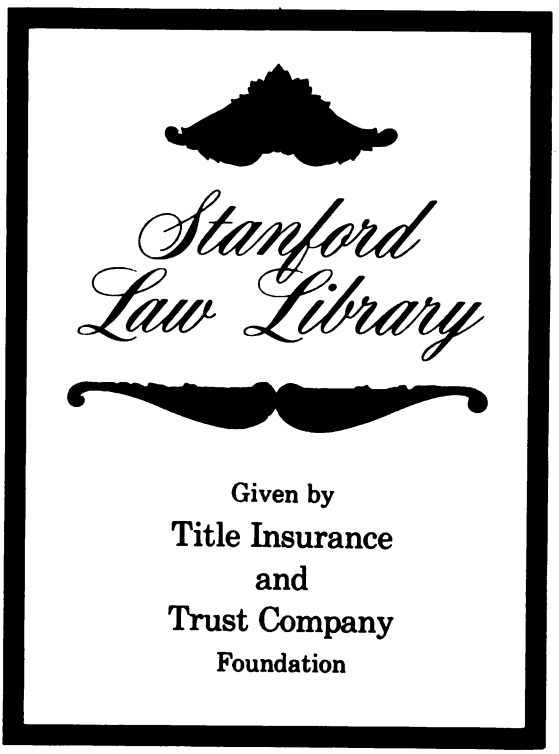
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THE

Principles and Law of Tithing.

ADAPTED

To the Instruction and Convenience not only of

GENTLEMEN OF THE PROFESSION OF THE LAW,

BUT

OF ALL PERSONS INTERESTED IN TITHES;

ILLUSTRATED BY REFERENCES TO THE MOST LEADING AND RECENT

TITHE CASES.

BY FRANCIS PLOWDEN, ESQ.

BARRISTER AT LAW.

Melius est jus deficiens quam jus incertum.

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1806.

DEDICATION.

To the Right Hon. Thomas Lord Erskine, Lord High Chancellor of Great Britain.

My Lord,

CALLED in an awful Crisis by your Sovereign, and followed by the voice of his people into the most exalted station of the Empire, your Lordship is looked up to more as the constitutional Friend, than the official Patron, of the respectable Body chiefly interested in the Subject of the following Sheets. To your countenance, therefore, are respectfully dedicated, with your gracious Permission, these humble Efforts, to trace the Principles, ascertain the Law, and reconcile the payment of Tithes to every class of the Community. I have the Honour to be with the most profound Deference and highest Esteem

Your Lordship's

Devoted and respectful Servant,

FRANCIS PLOWDEN.

Essex-Street, Temple,
June, 1806.

TO THE READER.

THERE needs no argument to prove the importance of the System and Law of Tithing to the Public. The general body of the clergy, some thousand lay impropriators, numerous lessees of tithes and other Church property, all possessors of land, and tjtheable matter are deeply interested in the subject: and most of them are occasionally advised and directed by Law Agents or Counsel in their conduct, management of, or contribution to this singular species of property.

IT is in nature, that a fund, supposed to constitute a tenth of the national revenue, should in its circulation produce contrariant impressions upon the generality of those, who pay, and those, who receive it. Multifarious must be the objections to the institution generally and particularly: all the ordinary emotions of the human mind, which attend the acquisition and deprivation of property, all the relative sensations upon the contribution of the profits and labour of the many to the ease and support of single individuals, the reluctance of internal dissent and conscientious scruple to external and costly submission, will unceasingly operate in producing difficulties to the system, to the collection, to the mode, to the quantum, to the proportion, to the times of payment, to the claim, to the title, to the application, to the spirit, to the principle, to the effect.

Be it the blessing or be it the curse of the present day, that every thing is to be discussed, and nothing taken upon credit, yet it is an unequivocal test of the wisdom and policy of human laws, that having withstood the silent lapse and turbulent revolution of ages, they acquire light, vigour, and efficiency from investigation. The mind is feeble or corrupt, that checks discussion. *Veritas nil veretur, nisi abscondi.* Mystery and compulsion are avowed enemies to truth.

The code, which dreads the light, betrays a mortal symptom. I have endeavoured to let in all the light I was able upon the theory and the practice of this institution, from the conviction, that nothing could be so detrimental to the public, as the continuance of ignorance or misrepresentation of any part of it. Of all objects of legislation, this primarily calls for full and fair discussion: the clergy, who receive their general subsistence from the institution, are the most learned body of the nation; the lay impropriators are amongst those, who have generally received from the clergy the best of education, and the profession of the law supposes the habit of lecture, consultation, and reasoning. To meet the researches, satisfy the doubts, and clear the difficulties of each of these classes of readers, it has been the aim of the author to leave no part of the subject unattended to. The book is intended for those of every class, who command not the means or opportunity of resorting to the numerous authorities, which may be required to form a satisfactory and conclusive judgment upon any one great point or head of tithing. Few, very few even of the profession, are furnished with a library which can answer a full search into any one given question upon tithes: an embarrassment, little likely to be removed from the daily encreasing number and price of legal publications.

The end of the work is to explain the nature of civil establishments of religion, of tithes, and other ecclesiastical revenues in this country; when first instituted, and how they have in process of time been altered, modified, and brought into their present form: and by what means, in what courts, and with what probable risk or success claims to tithes and exemptions may be pursued or resisted. What may appear pleonasm to one class of readers, may be found satisfactory to another, and necessary for a third. It has been therefore considered as a duty by the author, to offer nothing upon the strength of his own opinion: but to give his authorities so fully, as to supersede the necessity of resorting to the original books, which the generality of his readers must necessarily want. In his desire that every subject should be fully and clearly understood by the parties interested, he has presumed it would be satisfactory to many to be able to have recourse to some elementary explanation of the different courts, and proceedings in tithe causes: so far at least, as to fit their minds to the thorough understanding of the reports of tithe cases, which are written by lawyers, for gentlemen of their own profession, and from the lecture of which the parties interested may be enabled to form competent ideas of the embarrassments, costs, trouble and uncertainty of tithe suits, ere they engage in them. The whole statute law of tithes, which is collected in the Appendix, is necessary for those, who have not by them the Statutes at Large, and not inconvenient for those, who have. The forms of different processes and precedents, which make up the rest of the Appendix, will be useful to the practising lawyer in every department, and instructive to those, who may wish to know, but have not the means of resorting to the books, which might explain and disclose the nature of proceedings, in which they may be engaged.

The author disclaims all intention of entering into any polemical discussion of speculative opinions; he has endeavoured to argue from admitted assumptions, and draw conclusions conformable to the existing laws. He hopes for indulgence in case of any unintentional failure in his attempt.

ERRATA.

Page	Line	
52	22	of note, omit the word *that*.
76	1	for *to* read *of*.
77	30	insert the word *of* between the words *way* and *admitting*.
85	18	for *become* read *became*.
103	—	last line of note, for 406 read 403.
107	2	of second marginal note, for *of* read *are*.
125	19	between the words *glass-house* and *which* insert *the profit of*.
152	23	for *alliance* read *aliance*.
166	15	for *pays* read *prays*.
171	6	of note, for *non* read *usu ac*.
210	2	for *Burré* read *Burn*.
234	—	in first reference read 339 for 439.
235	18	omit *of*.
241	—	last line but 6, for *archbishop* read *archbishops*.
241	34	for 34 read 28.
314	—	last line but one of note, after the word *but* insert *the court will allow such articles to the*.
449	17	for *at* read *as*.
464	38	omit *the* before *other*.

The Principles and Law of Tithing.

BOOK I.

CHAP. I.

Of the Principle and Nature of a Civil Establishment of Religion.

THE misconception and misrepresentation of the term *civil establishment of religion, or religious establishment*, have produced difficulties and objections to the system, which a fair understanding of the nature, spirit, and effect of the thing itself in its actual state of existence, would never have occasioned. The first and perhaps not the least important object of these researches, is to deduce the title of the establsihed clergy to their tithes, and other ecclesiastical maintenance from the real principles, upon which the support of an *established clergy* has ever been made an integral part of our constitution, since that constitution has assumed a settled form. The prosecution of this object sanctions the assumption of whatever the admitted doctrines of the church of England, and notorious historical facts render useless to be proved. *Perspicua non sunt probanda.*

Misconception and misrepresentation of the term create the objections

The spirit, in which the exclusive right of the established clergy to tithes, and other ecclesiastical maintenance in this country, has been at different times agitated, and particularly at the beginning of the 17th century, has rather been of late revived than extinguished. "Must the members," says Dr. Priestley, "of this favourite "church of yours? engross all the good things of this life, as well as "those of another; and must we unfortunate dissenters partake of "neither *." Men of the first erudition, of prominent talents and unquestionable respect, heretofore marshalled themselves in opposite ranks. Sir Henry Spelman, Dr. Comber and many zealous advocates and illustrious ornaments of the church of England, warmly espoused the *divine right* of tithes. The learned Selden, and those who fell into his reasoning, considered, that they more effectually supported the clergy's inheritance, by resting it on the laws of the land, which were proveable in courts of justice, than

* Priestley's letter to Mr. Burke, p. 132.

upon a *divine* title, which was to be traced from the ineffable source of revelation, supported by the construction of the old and new testament, and enforced by the internal workings of conscientious obligations. The *divine right* of the clergy to their maintenance, and of the king to his throne, was generally supported by the same set of men on the same principles. The critical æra of the revolution of 1688 appears to have thrown much light on those two once favorite extreme doctrines, of resting the title of the king to his throne, and of the clergy to their tithes upon the *jus divinum*, or a heavenly title, which the learned and respectable prelate of Worcester freely admits, were "* broached indeed by the clergy, but not from those "corrupt and temporizing views, to which it has been imputed. "The authority of those venerable men, from whom it was derived, "gave it a firm and lasting hold on the minds of the clergy; and "it is feared, still continues to perplex and mislead the judg-"ment of too many among us."

Jus divinum to tithes and thrones.

Liberty of conscience the ground of every *civil* establishment.

In a country, which boasts of enjoying *civil* and *religious* liberty in a higher degree of perfection, than it is enjoyed in any other, the right of each individual's choice of, or (in equivalent though other words) the conscientious obligation of adopting that religion, which the individual believes to be true, must be a fundamental axiom. To some it may appear rather paradoxical, though reflection will digest the paradox into a demonstration, that in real liberty of conscience, every *civil establishment* of religion is essentially founded. God has given no power to the *civil magistrate* to controul or force the conscience of the individual in any internal intercourse of the soul with its Creator. But he has invested him with a power to enforce submission to the acts of the supreme legislative power of each community, whenever such acts do not contravene his divine ordinance. The necessity of sovereign power, and the duty of submitting to it are enjoined by the *general* dispensation of God's providence in those *moral* laws, by which he preserves and governs the human species. The injunction, though general, is not therefore less binding, wherever it attaches in particular. God commands no individual to belong to a particular society or community; but he requires of every individual to submit to the sovereign power of that community, to which for the time being, he shall belong or reside in, for the sake of the moral order and government of the human species. God imposes upon no man, either for a limited time or for life, an absolute and positive obliga-

The civil magistrate has no power over the conscience.

General nature of human power.

* *Hurd's* Moral and Political Dialogues, vol. ii. p. 302.

tion of submitting to any particular laws or rulers of any community. No community, no civil power, no human legislative body, can directly impose any conscientious obligation upon an individual. That directly and immediately arises from God's general injunction to all mankind, to obey the powers that are, for the preservation of the moral order of society established in the general dispensation of his providence. An *Englishman* whilst in *China*, as to any conscientious obligation, is as little bounden by the laws of England, as if he were a native of *Canton*. On the other hand, a *Chinese* whilst in London, is as conscientiously obliged to submit to the laws of *England*, as if he had been born within the ligeance of his majesty. But where God vouchsafed immediately to interfere in the appointment of rulers, and in the formation of laws, the conscientious obligation of submitting to them was absolute. It is presumed, that a Jew living in the time of the *theocracy*, * could not by quitting Judea, have conscientiously thrown off his obligation of obeying the *divine appointer* or ruler of *Israel*, or of submitting to the Jewish laws, which were enacted immediately by God, and personally bound every *Jew* in whatever part of the world he might have been.

Jewish theocracy.

By the general dispensation of God's providence all human power is originally and mediately derived from him: he has thereby imposed upon each individual, as a social creature, a conscientious obligation of submitting to it, in whatever community he shall actually reside. The precept, *thou shalt not steal*, is a command of God, that equally binds the consciences of all men: but it is grounded upon the presumption of private property and peace being necessary for the preservation of society. Although individuals be bounden in morality and conscience, to respect the property of their neighbours, and although whatever we possess in this world proceed originally from God, as the creator and dispenser of all worldly blessings, yet it is not true, that God gives us *immediately* a right or title to our property. Man possesses property, not by *divine*, but by *human* right. The actual occupancy, and the exclusive possession of property by one individual against all mankind, the conveyance of it by certain forms, and under certain qualifications and conditions to others during life, the transmission of it even after death to relatives, friends, or strangers, all depend upon the municipal laws of each different state. The sovereign power of the particular state, which enacts the law, and thereby vests the property, is not the power, which immediately binds the conscience, though

Nature of human power.

* Vid. my Church and State. 2 l. 2 ch. and *alibi passim.*

it enacted the law which makes, gives, or vests the property, the purloining of which becomes sinful, and therefore affects the conscience. The conscience is immediately bounden by the divine precept, *thou shalt not steal.* So is it with power or authority: God commands and enjoins submission to it, but the community gives it. Thus St. *Peter* speaking in the immediate and particular sense of *civil* or *temporal* power or authority, calls kings a *human ordinance,* (or appointment); and St. *Paul* speaking of it in the mediate or general sense, calls magistrates the *ordinance of God.*

A religious establishment interwoven in our constitution.

The very earliest traces of our constitution bespeak it's interwoven texture of *church and state.* Upon the *assumption* that religion promotes morality, our ancestors determined that a *religious establishment* should be sanctioned by the community, and that the *legal* establishment of it should form an essential part of the constitution. Now although government be essential to society, yet the particular form of government, which each society should adopt, was left to the free option of each separate community, and must for ever necessarily remain open to whatever changes or improvements it shall think proper, convenient, and necessary from time to time to introduce. Although a religious establishment be essential to our constitution, yet the particular modification of that establishment must necessarily remain for ever subject to all the variations and improvements, which it may receive from the *civil* magistrates, or legislative power of the community, which instituted and preserved the establishment for its own ends. Without entering, therefore, into any polemical discussion of the particular tenets, doctrines, or principles of what once was, or now is the religion sanctioned by the laws of this realm, it must be allowed, that whatever that mode of worship may be, in the free and conscientious adoption of which the majority shall concur, the community has the unimpeachable right of countenancing and supporting it by civil sanctions, or in other words, of making it the established religion of the country. The adoption of a particular church establishment by the state, has precisely the same binding obligation upon the community, as the enacting of any other civil regulation or ordinance.

The *civil* establishment affects not the truth of the religion.

The *civil establishment* of a religion produces no effect upon the nature or truth of the religion itself: the Presbyterian religion in *England,* where it has no *civil* establishment, is no other, nor more nor less true than in *Scotland,* where it is the *established* religion of the country. The Roman Catholic religion is one and the same, since it has ceased to be the *established* religion of this country, as it was, whilst it was sanctioned and established by the law of the

land. The effects of this civil sanction or establishment are necessarily of a mere civil nature; thus are the ministers of the established religion supported, maintained and dignified by the state; they form a separate body from the laity; are bounden by ordinances, regulations, and canons, to which the laity are not subject; in many instances, they are made corporations, and are enabled to sue and be sued in their corporate capacity; and are entitled to many civil immunities, rights, liberties, and privileges in the state.

It would be foreign from the object of this work, to enter into the political, philosophical, or theological reasoning of grave and learned men, for and against the propriety and advantage of such civil establishments. The application of some fundamental principles will conduct the mind more clearly and immediately to the true inference, than the most elaborate, minute, and impartial investigation of all the reasons and arguments, that have been written upon the subject. In the existing relations of policy and religion throughout christendom, many cogent arguments may be alledged against the adoption of such an establishment in a new government, which do not weaken, but rather enforce the necessity of maintaining and preserving it, when once established in an old one. The latter case alone affects our constitution.

Religious toleration.

Wide is the difference between submission to the civil sanction or establishment which the state gives to the ministers of any religious society, and the intellectual adoption of the peculiar tenets and doctrines, which distinguish that religious society from any other. Every particular species of toleration is but a redundant declaration of the legislature, that they do not mean to force or impose the belief of any particular religious tenets upon the consciences of individuals.

Acts of the majority bind the whole.

As the right of commanding imports the obligation of obeying, it becomes necessary to consider, not only the right or obligation of the civil magistrate to make, or institute, but also the duty of the individual to submit to the civil establishment of a religion, which individually he may think erroneous. It is neither indifferent nor unimportant to ascertain the real and conscientious grounds of that submission, which is required of the minority of a community to the acts of the majority, when they have once passed into laws; although the dissenting minority had previously opposed the passing. The radical ground, upon which the right and duty of the civil magistrate rest to frame and support a *civil* establishment of any religion, is the possibility of a man's sincere conviction of error. Experience in the British Empire shews, that the same civil magistrate

gives a civil establishment to several distinct religions at one and the same time; to Episcopalian Protestancy, in England, Ireland, and Wales; to Presbytery in Scotland, and to the Roman Catholic religion in Canada. The civil magistrate in the mean time, though consisting of several individuals, each necessarily differing from some of these distinct religions, to which a civil or legal establishment is given, is in no manner committed, either as to his own particular credence, or to that of the individuals adopting any of those systems, which have received a civil establishment. The principles of nature, equity, and right reason, ought to form the basis of every human or civil law; these are, in their nature, uniform, steady, just, infallible, universal, everlasting and all-sufficient: they are the instinct of a benign Providence, instilled into the hearts of all rational beings. Although it be the conscientious duty of legislators to form and model laws upon these principles; yet as every civil law is but a human institution, it is essentially liable to, and actually affected by the frailty and fallibility of its makers. The most consummate wisdom and experience, the most undefiled uprightness and integrity of the individual legislators, will not alter this essential attribute of every *temporal* law. The conscientious obligation of submitting to a *temporal* or *civil law*, depends not upon its degree of conformity with those principles, upon which the legislator ought to have framed it. It is morally impossible, that any two given laws shall in an equal degree approach to, or deviate from these principles. The sole quality, that renders a law obligatory or coercive is its validity: which assuming a competent legislator, fundamentally depends upon the nature of the thing enacted. If it be in its nature good, or even indifferent, and capable of being observed by all the members of the state, all subjects are bounden to obey the law, whatever may have been the motives or intentions of the legislators in passing it. If it be contrary to, or inconsistent with the law of nature and the word of God, (this is putting an improbable extreme) no subject can lawfully obey it; because such a law cannot be valid. Within the scope of lawful or indifferent actions, *civil* or *temporal* legislators are bounden to frame such laws, as, according to their judgment and discretion, tend to advance the unity, peace, and welfare of the community, which is the whole extent of their duty, trust and mission.

The binding nature of human laws.

In saying, that the civil magistrate has no cure of souls, I pretend not to deny, that his power reaches to the suppression of moral evil, and to the encouragement of moral good. St. *Paul* writing to the *Romans* about their civil magistrate, says, (13 ad Rom.) that

The civil magistrate has no cure of souls.

he is to be "a *terror to evil doers, and a praise to them that do well.*" When he fully asserts the power of the magistrate, it is the power of the heathen magistrate, such as was vested in him, previous to, and independent of christianity. Whatever, therefore, according to St. *Paul*, he was obliged to do, was what the light and law of nature dictated. Such as St. *Paul* represented the *civil magistrate* to the *Romans*: such did he remain after his becoming christian; for christianity gave him no new power. The heathen *civil magistrate* had fully as large power over and about religion, as if he were christian: and is bounden to take equal care of the morals of his subjects, according to the light of nature. The powers of a parent over his child, of a master over his servant, and of a sovereign over his subjects, were all instituted by God, and engraven in the hearts of men, *by the instinct or light of nature*, before the Almighty committed the *divine* legation to Moses, or in his greater bounty revealed to mankind the mysteries of christianity. Although the performance of these duties be greatly perfected in the exercise by the light of the gospel, yet the duties have ever continued the same, as has also the conscientious obligation of submitting to them: therefore the apostle saith (v. 2.) in speaking of the heathen magistracy of *Rome*, "*whosoever therefore resisteth the power resisteth the ordinance of God.*" The inference is: the power, which the magistrate has, is ordained by God, and therefore does it bind the conscience of man. It will be readily allowed, that the conscientious obligation to obey, must be commensurate with the power of the magistrate to command. As this power of the *civil magistrate* was instituted by the general ordinance of God, and the obligation of submitting to it, was implanted in the breasts or consciences of men, through the instinct or impulse of the light of nature, it follows, that there can be no alteration in the nature of it from its first institution. The duties of the magistrate have not altered; his jurisdiction has neither been enlarged nor narrowed. Whatever, therefore, is left to the judgment, discretion, or conviction of the individual, is not within the controul of this divine ordinance; for then the will and convictions (however erroneous) of the governor, would controul those of the governed, and the magistrate would sin by tolerating, or suffering any thing to be done by the individual against the internal convictions of his own mind. Such discretionary power and duty in the magistrate would prevent the very possibility of any *liberty of conscience*; for so the private convictions of the *civil magistrate* would controul and compel those of all his subjects, who avowedly are un-

Heathen and christian magistracy the same.

der a conscientious obligation imposed upon them by God, of obeying the *civil* magistrate in every thing, in which he has the right, and *à fortiori*, in which he is under the obligation of commanding. As all men, therefore, have received equally the same general instinct and impulse from the light and law of nature; and as these are the means, or instruments, by which God has implanted in the hearts of men the general ordinance, which St. *Paul* forbids us to resist, it is undeniable, that the power and duties of the *civil magistrate* are such only, as the light and law of nature will teach and enable him to perform. Thus are divine revelation, dogmatical opinions, and the internal dictates of conscience formally excluded from the resort, competency, power and controul of the *civil magistrate*.

Power of Parliament purely civil,

All that our parliament, as a *civil power*, can bestow, must necessarily be of a *civil* nature: thus by them are the ministers of the established religion supported, maintained, dignified, and also entitled to many *civil* immunities, rights, liberties, and privileges in the state. As all these things are of a *civil* or *temporal* nature, and of themselves indifferent as to their absolute existence, they may licitly be enjoined by the civil power; when so enjoined, they will form real and valid laws; and such laws each member of each community is by the general disposition of God's superintending providence, conscientiously obliged to submit to. Our parliament takes not upon itself to direct in matters of religion; it leaves the adoption of it to each individual; it knows, that God has reserved to himself the immediate intercourse with the soul of every rational creature: it admits, that he alone judges of the internal conscientious duties imposed upon his creatures; and that to erect a tribunal for determining how far individuals have complied with, or resisted the light of heaven, would be a palpable excess of its delegation, and something very like an encroachment upon the divine prerogative. When it has evidently appeared to the legislature or sovereign power, that a majority of any considerable or distinct part of the community under its jurisdiction concurs in a particular mode or form of religious worship, it is obliged, by the nature of its delegation and trust, to give to the religion of such majority a *civil sanction or establishment*, when called for by such majority: it has no power to judge or direct the consciences of individuals, although it have it in charge to check such immorality, and to promote such morality, as the law and light of nature direct and require; and in doing this, it provides for, and secures the peace, order and welfare of the community.

When our parliament gives *civil sanction* to the Episcopalian Protestant religion in *England*, to the Presbyterian religion in *Scotland*, and to the Roman Catholic religion in *Canada*, the laws, by which these several establishments are set on foot and secured, are all of equal force and validity, and are therefore equally binding on the consciences of all persons, subject to them; not on account of the truth of the religion, to which they give a *civil establishment*; not on account of the intention and views of the legislature in passing them; still less on account of the effect they may produce in forwarding or checking any particular religion; but because they are valid laws of the state, and to such the general ordinance of God enjoins submission. So a conscientious member of the church of *England* living in *Scotland*, is bounden to follow and exercise his own religion, which he thinks true, and at the same time not to resist or oppose the laws, by which the *civil* establishment is given throughout that part of the united kingdom, to the Presbyterian religion, which he may think false. Under the like relative obligation, would a conscientious and sincere Presbyterian be with respect to the Roman Catholic religion at Quebec; and a Roman Catholic in *England* or *Ireland*, though he cannot conscientiously adopt the Protestant religion, is still bounden not to oppose and resist but to conform and to observe the laws, by which it receives the *civil* sanction of the state.

The law is the security of civil establishment.

As the decided majority of this part of the united kingdom are of the church of England, as by law established, endless confusion, disorder and discontent, might happen in the nation, if they had not Protestant churches to frequent, and Protestant ministers to preach and administer to them the sacraments and rites of their own religion. It is the avowed duty of the *civil magistrate* to prevent confusion, disorder, and discontent; and therefore is it, that our parliament, under the existing circumstances, is bounden to give a *civil* establishment to the Episcopalian Protestant religion in *England:* and consequently it may pass *valid* laws for that purpose. Yet although each individual subject residing in *England*, be conscientiously bounden to obey such laws, his conscience is in no manner committed in the truth or falsity of the religion, for the ministers of which a maintenance is by law provided,

A civil establishment may be demanded by a decided majority.

In order to explain this the more fully, let us consider how our Blessed Redeemer acted for our example, in such instances, when upon earth. *Judea* was in his time subject to the power of the Roman Emperor: an idolatrous worship was established throughout the empire. The Emperor himself was looked upon as the *pontifex Max-*

Example of our blessed Lord's paying the tribute money to the heathen emperor.

imus, or the high priest: and the actual application of a part of the taxes was made to support an idolatrous and false religion. All positive laws of the empire, that immediately required or enjoined its subjects to sacrifice to idols, or to apostatize from and renounce God and his holy law, *were null and void:* but such as merely enjoined the payment of money, a part of which was applicable to the support of their idolatrous priests and temples, were obeyed and complied with by our Lord, who paid the tribute for himself and St. *Peter*, without enquiring into the particular application of it. This like every other action of our divine master, was for our instruction and example; and it emphatically teaches every christian the same obligation of paying taxes, tithes, or such like impositions, when imposed by the *civil* power, whether they be applied wholly to mere *civil* purposes, or partly to the support and maintenance of the ministers of the religion, which requires the civil sanction of the state; and it is immaterial, whether such religion be true or false, christian or heathenish. I assume then, that tithes are not paid, because the parson is entitled to them by the *revealed* law of christianity, but because they are secured to him by the *civil* law of the state.

The law is the best title of the clergy to their tithes.

Were the clergy to claim the payment of tithes *jure divino*, it is obvious, that their title must ever be resisted by those, who deny the existence of any *spiritual* power upon earth: and many are they, who maintain that doctrine; whilst few can be singled out, that deny the conscientious obligation of obeying or submitting to the laws of the land they live in. In order to carry our ideas clearly to the conclusions I aim at, it will be necessary to draw the attention to the general nature of *spiritual* or *ecclesiastical* power or *authority*, as it differs, or is supposed to differ from that *temporal* power or authority, which exists in the *civil* magistrate: for I again repeat, that christianity introduced no change into the power of the *civil magistrate*. Much error and misconception have originated out of an inconsiderate confusion of the theocracy of the Jews with the establishment of the reign of Christ in the law of grace. It becomes more necessary to clear away this mist, as constant reference is made to that high source, by the advocates for the *jus divinum* in tracing the clerical title to an established maintenance in the new law.

Whether in the law of nature, before the divine legislation to Moses, there were any *spiritual* authority, to which man owed submission separate and distinct from the *civil* and *temporal* authority, which always subsisted on earth from the first formation of government, will be here needless to inquire. The reason for taking

a general and passing view of the establishment of the Jewish theocracy, is to point out its difference from the establishment of christianity, which set on foot that *spiritual* power or authority, to which those christians, who admit of church government, acknowledge any submission.

The Jewish theocracy.

By the term *theocracy*, I mean a government established and immediately superintended by God. The very import of the term is a full explanation of the difference between a *civil* or *temporal* and a *theocratical* government, such as was that of the Jews. In this, God condescends to direct, order, and superintend immediately: in that, he leaves the direction, order, and superintendance to the community: but he does not require of man more strict obedience, or submission to one, than to the other. One admits of no change by the community, whilst God continues the theocracy: the other obliges as strongly to all changes and repeals, as to the first institutions of the laws made by the community.

It appears by the historical narration of the old testament, that without any deliberation or consent of the people, God formed both their *civil government* and *religious establishment* at one and the same time and by the same means: as long as this theocracy lasted, so long lasted the indissoluble union or alliance between their religion and their state; no alterations in their *civil* governments could at any time be introduced, or effected, but by the fresh intermediation of God, in an immediate and (properly speaking) a miraculous manner. They were called God's people, not only because they believed in him and served him, but because they were ruled by his particular law; an exclusive preference or favor, which he granted to no other community on the face of the earth. From the greatest to the most trivial circumstance in their religion and their state, was every thing written by inspiration of the immediate author of their theocracy; every thing was disposed by God's peculiar order; so that the same could not be put in practice, but in a free and independent nation: and, therefore, the Jews could not, without overturning their religion, alter their *civil* government, or incorporate with, or submit to a foreign state; consequently the overthrow of their *civil* government, was attended by the immediate abolition of their religion: in a word, there was amongst them no legislative authority: God having done that for them, which he left to the rest of mankind to do for themselves. Their kings, and judges, and rulers had no other commission, than to execute the law of God amongst his people; they could neither add to, nor diminish, alter, nor abrogate the law: the administration of the religious worship,

(or the priesthood) was committed to one particular tribe, to whom by God's special command, no lands were allotted, as to the other tribes; but they were maintained by the tenths (tithes) or other revenues out of the other tribes: so that the Jewish theocracy clearly comprized not only *spiritual*, but also *temporal* objects, such as land and riches. The very place of worship and sacrifice was fixed upon by God, and he appointed not only the person, who should build the temple, but gave the most minute directions about every particular part of it; from the general form and dimension of the whole edifice, to the measure of every particular chamber, and the weight of a flesh hook; the materials and form of every vessel and utensil of the tabernacle; the pattern and fashion of Aaron's and his son's garments and ornaments were directed by God; nothing was left to the discretion of architects, builders, governors, rulers, or priests.

The theocracy formed to verify the prophecies concerning the christian religion.

As the whole system of the Mosaic dispensation was intended by God, as a figure or prototype of the law of grace, which he intended in the hour of his greatest goodness to man, to establish in his sacred person upon earth; so could not the mere discretionary and fortuitous actions of man have prefigured the different symbols of the mysteries of the incarnation; for this the immediate interference and direction of God were necessary: he regulated its duration, in order to fulfil all the prophecies concerning his coming, and to afford *human* as well as *divine* proofs of their accomplishment: he chose a particular people, from whose royal stock he was to descend according to the flesh, to be, as it were, the depository of the sacred records, which were to testify and prove his coming to the end of time. Amongst the *Jews*, their religion, their ceremonies, their laws, their customs, their rulers, their priests, their maintenance, their temple, their taxes, their payments, all were specially and immediately directed and ordained by God himself; neither the whole, nor any part of the community had power or authority to make the least alteration in them, by way of reform, improvement, addition, diminution, or repeal. The natural or rather social rights of the *Jews* to form their own government were annihilated or suspended by this special favor of God, in legislating for them; consequently no sort of parity, precedent, or example can be drawn from the actions of the kings, priests, and rulers of the *Jews*, to prove and establish such right, power or authority, *spiritual* or *temporal* in any man since the abolition of that theocracy, and the cessation of God's immediate interference with any temporal government. In no part, therefore, of the Old Testament, do

we find any thing like an express injunction to the *Jews* to obey their *temporal* rulers, superiors, or sovereigns, as we do in the new: for as God had legislated for them, there was in fact no legislative power existing in the nation: the *civil* magistrate had no discretionary right, or power of commanding, as he has in all other communities.

No legislative power amongst the Jews.

The christian religion is tied to no particular place, as was the *Jewish*; nor is the ministry thereof granted as a privilege to one particular nation or family. Each nation has an equal participation in all its benefits: none can claim a preference of right or prerogative over others. *There is neither Greek nor Jew, circumcision nor uncircumcision, barbarian, Scythian, bond nor free: but Christ is all and in all**.

Universality of the christian religion.

The scriptural accounts of the first propagation of the gospel are pointed, in marking its independence of any, and its aptitude to all *civil* governments, by collecting together into the first sheaf of the christian harvest, individuals of the most distant, discordant, disparate, and hostile states, such as *Jews*, *Greeks*, *Romans*, *Parthians*, &c. But the example of our divine legislator is a more striking lesson of the independence of his doctrine and laws of any *civil* power or authority: he assumed or exercised none in his own person; and on no occasion did he call, in aid of his mission, the arm of the *civil* magistrate. He did every thing in the reverse: he kept up the appearance and reality of poverty, from the cradle to the cross: he humbled himself, washing the feet of his disciples: when the multitude would make him a *temporal* king, he absconded and made his escape: he would not execute the office of a judge, or administer *temporal* justice; he declined arbitrating upon *civil* matters between individuals; he paid taxes to the *Roman* emperor, and permitted himself to be judged and executed by the executive government of *Judea*; all which things are contradictory to, inconsistent with, and exclusive of *temporal* sovereignty: he severely rebuked his disciples, who appeared surprised at his not using the powers, (which they knew he possessed) of resistance against the unjust sentence of his death.

Nothing human in the christian religion.

The miracles, which Moses performed, were calculated to remove a whole people out of a land of bondage, and establish them in a land of promise, which were *temporal* objects: the miracles of Christ were calculated to impress the minds of men with general benevolence and charity; *he went about doing good, and healing all that were oppressed by the Devil* (Acts, xvi. 38.) No one act of his

No object of temporal power affected by Christianity.

* Colos. iii. 11.

mission, jurisdiction or power, when upon earth, went to affect a single object of *civil* or *temporal* power: he even chose rather to work a miracle, in order to provide himself with the means of paying the tax to the *Roman* Emperor, than to leave it to the judgment of men, by what title he could have acquired any *temporal* property. Indeed all the inspired writers appear anxious to impress us with the conviction, that as he possessed nothing in this world, so *temporal* possessions were no objects of his divine mission.

The means of teaching and propagating christianity.

He never would permit external or forcible means to be used to promote, or inculcate his doctrines: no aid of the *civil magistrate* was ever called for, much less enjoined: *he that hath ears to hear let him hear* *; *for faith is from hearing* †. Preaching was the only mean Christ used, and commissioned his disciples to use: he neither employed, directed, nor authorised any coercive power to compel submission: he allured men by no flattering prospect of a promised land or temporal prosperity: but he foretold to his followers, that they were to expect adversity and persecution in this world; though such as should not receive and follow his word, should meet with condign punishment; not in this life, but in the next. *He that believeth not shall be condemned* ‡.

What the kingdom of Christ is.

The sacred text is as explicit in describing the nature, as it is in deducing the derivation of the power of the kingdom of Christ; for when Pilate observed "that he then professed himself to be a king" he answered *that he was a king, but a king of truth, and for this cause he came into the world, that he should bear witness unto truth* §. Hence the supporters of church government infer, that there does exist in this world, a *spiritual power* or kingdom of Christ, which is not derived from any temporal source, but comes immediately from God, and which has not for its object any of those temporal things, which are the objects of *temporal* Sovereignties.

What the kingdom of Truth is.

The establishment of this kingdom of truth, of which our blessed Redeemer professed himself to be really the King, is the establishment of christianity, which is essentially separate and distinct from, and wholly independent of any *temporal* or *civil* government or state whatever: it is a kingdom of truth, in which Christ, by force of truth, brings souls to his obedience; and he has by word and example taught us, that it was not to be supported by the means of coercion and force, which are necessary to maintain *civil, human* or *temporal* governments in due submission or obedience. But as it is a kingdom, it must necessarily be supported

* Luke, viii, 8. † Rom. x. 7. ‡ Mark, xvi. 16. § John, xviii. 37.

by government. Any discussion upon the nature and effects of this government would here be redundant, because I write for those, who generally admit its existence in some degree or other.

Church governors.

Both *high* and *low* churchmen admit the existence of church governors, or Rulers, however they may differ as to the origin and extent of their powers. But since there can be no right to command, rule, or govern, where there is not an obligation to submit or obey, I shall also presume the general understanding of the words of *St. Peter* to the *Hebrews* *, as spoken of *church governors*, and not of the *civil magistrate*. *Obey them that have the rule over you, and submit yourselves, for they watch for your souls, as they that must give account* †. Here it will be proper to rectify a prevailing error, under which many represent the whole body of the clergy as the governors, and the laity as the governed of Christ's church. Even the learned *Sherlock* was not clearly decisive upon this point ‡: "Though the clergy have of late, in a great measure monopolized "the name of The Church to themselves, yet in propriety of speech, "they do not belong to the definition of it. *They are indeed the* "*governors of the church*, as they have received authority from "Christ the supreme Lord bishop of the church; but they are no "more the church, than the king is his kingdom, or the shepherd "his flock; the bishop, and pastors of the church, considered as "such, represent the head, but not the body," &c.

Ordination produces no civil effect.

Such of the clergy, as have received holy orders, have acquired thereby a real spiritual character and capacity of exercising certain

* Heb. xiii. 17.

† The *Greek* text, Τοις ἡγουμενοις ὑμων seems fairly translated in the *Latin* vulgate *præpositis vestris*; the *English* version, *of them that have the rule over you*, appears fairer than the *Rhemish*, which renders it *your prelates*. The common accepted term *prelate*, in *English*, is limited and confined to the *episcopal* order, which neither the *Greek* nor the *Latin* text can, in this place, warrant. The duty and office of *watching over souls* αγρυπνειν ὑπερ των ψυχων, and the responsibility for them, or the *giving* or *rendering an account* ως λογον ἀποδωσοντες, viz. to God, are the characteristic marks of persons invested with *spiritual* or *ecclesiastical* power or authority, of whatever rank or order they may be. I attempt only to prove, that the soul or conscience is the exclusive object of *spiritual* power, which is immediately derived from God; and therefore is the account of the use of that power, to be rendered to him alone, who alone gave it. The unequivocal admission of *spiritual* or *ecclesiastical* power in the church was as expressly made by the divines attending the parliamentary commissioners at the treaty of Newport in 1648, who opposed episcopacy, as by his majesty king Charles the First, who gave his full reasons, why he could not in conscience consent to the abolition of the *Episcopal* government. The reasons, answers, and replies, which are worthy of attentive perusal, were published together in a small quarto in 1660.

‡ *Vide Sherlock's* discourse of the nature, unity, and communion of the catholic church, p. 32. 34.

spiritual functions, which before their ordination they did not possess: but this ordination produces of itself *ex vi suâ*, no *civil* effect upon the party ordained; by it he neither loses nor acquires any *civil* or *temporal* advantage; he remains equally subject to the *civil* magistrate.

Many laws of the state apply to the clergy of the established church, by way of exemption, privilege, right, benefit, honor, preferment, dignities, possessions, succession, and representation: but whatever they enjoy, possess, or are entitled to, above or beyond the laity, is the pure and sole effect of the laws of the state; for the laws and regulations of the church, could produce no such effect: and without the laws of the state, a clergyman of the establishment, would acquire merely by his ordination or jurisdiction no more *civil* advantage, than is now conferred on a Roman catholic priest, or a dissenting minister by his ordination or spiritual jurisdiction.

Difference of *order* and jurisdiction.

Essential is the difference to be made between *order and jurisdiction*; the first gives a character and a capacity of exercising the ministry when called upon; in the ancient church, orders were seldom or never conferred upon persons, till they were chosen or appointed to exercise the ministry, and therefore the collation of spiritual jurisdiction has been frequently and erroneously supposed to be given by the act of ordination; yet are they so perfectly distinct from each other, that a person in full orders, (even in the episcopal order) may have no part or share whatsoever in the government of the church, whilst a person not even in deacon's orders * may, in some instances, possess and exercise it. It is by *jurisdiction* that the government of the church is supported and carried on; and to such only, who have it, is the duty of spiritual submission and obedience to be performed. There is certainly a general deference and respect due from all christians to the character of a clergyman, who has received ordination, and is destined and generally prepared to exercise the spiritual functions and ministry of the gospel, when he shall be called upon, or commis-

" * A bishop, *as bishop*, had never any ecclesiastical jurisdiction; for as soon as he " was ELETCUS et CONFIRMATUS, that is after the three proclamations in " Bow church, he might exercise jurisdiction before he was consecrated: for till then " he was no bishop neither could he give orders: besides suffragans were bishops, and " they never claimed any jurisdiction." DISCOURSES, of John SELDEN, printed in quarto, 1689. p. 4.——With this agrees the learned judge Sir Matthew Hale, who says, " That every bishop by his ELECTION and CONFIRMATION even before " consecration had ecclesiastical jurisdiction annexed to his office," HIST. COM. LAW, ch. 11.

tioned by the proper spiritual authority to do it: but the specific and obligatory duty of obedience, which is required of christians, can only be fulfilled by paying obedience to those individuals, who are lawfully deputed to superintend, watch over, and provide for the care of their souls; and this, generally speaking, is confined to each man's bishop, and to those, who act under him as his attornies by his delegation, or commission, to exercise the ministry over a part of his flock. So a parishioner by obeying his rector, vicar, or curate, fulfills his obedience to the bishop, who *instituted* him to exercise his spiritual functions over that particular parish, as a part of his diocess. The authority of a christian bishop consists in the lawful delegation of a portion of that jurisdiction, which Christ has deposited with his church: and the government of Christ's church, according to the opinion of those, who admit of episcopacy, is, properly speaking, confined to the *episcopal* order *.

Power of the Keys.

I assume (under correction) that it is the received doctrine of the church of England, that the pure *spiritual power, authority*, or *jurisdiction*, which exists in *church governors*, independently of the *civil* magistrate, is that, which is usually denominated and well known by the term, *Power of the Keys*, and extends to that exception, which is found in the words of the king's commission to *Cranmer* for his bishoprick. *Per et ultra ea quæ tibi ex sacris litteris divinitùs commissa esse dignoscuntur, over and above those things, (i. e. those powers and authorities), which the holy scriptures do testify, are given to thee by God.* This the *civil* magistrate did not pretend to give: nor are any objects of the *civil* or *temporal power*, within the competency or reach of this pure *spiritual* power: this is more minutely explained in the judgment of the eight bishops, upon the king's supremacy, of which *Cranmer* was the first †. "Bishops and "priests have the charge of souls, are the messengers of Christ, to "teach the truth of his gospel, and to loose and bind sin, &c. as "Christ was the messenger of his Father."

Data upon which our laws are founded.

It is not my purpose to discuss the propriety, expediency, or policy of the existing laws, but merely to ascertain what they are. This pursuit leads me to consider the *data*, upon which the laws have been made. It will upon enquiry be found, that the com-

* "The care of the catholic church was committed jointly, as well as severally, and "in the whole, as well as in part, to the apostles and their successors, THE BISHOPS, "in which the government of the church differs from the government of the world."—*Hicke's Christian Priesthood Asserted*, &c. 3d edit. 1711, p 211.

† Ex Mat. D. Stillingfleet's, quoted by Bp. Burnett, Appendix to first vol. of his Reformation, p. 177.

der a conscientious obligation imposed upon them by God, of obeying the *civil* magistrate in every thing, in which he has the right, and *à fortiori*, in which he is under the obligation of commanding. As all men, therefore, have received equally the same general instinct and impulse from the light and law of nature; and as these are the means, or instruments, by which God has implanted in the hearts of men the general ordinance, which St. *Paul* forbids us to resist, it is undeniable, that the power and duties of the *civil magistrate* are such only, as the light and law of nature will teach and enable him to perform. Thus are divine revelation, dogmatical opinions, and the internal dictates of conscience formally excluded from the resort, competency, power and controul of the *civil magistrate*.

Power of Parliament purely civil.

All that our parliament, as a *civil power*, can bestow, must necessarily be of a *civil* nature: thus by them are the ministers of the established religion supported, maintained, dignified, and also entitled to many *civil* immunities, rights, liberties, and privileges in the state. As all these things are of a *civil* or *temporal* nature, and of themselves indifferent as to their absolute existence, they may licitly be enjoined by the civil power; when so enjoined, they will form real and valid laws; and such laws each member of each community is by the general disposition of God's superintending providence, conscientiously obliged to submit to. Our parliament takes not upon itself to direct in matters of religion; it leaves the adoption of it to each individual; it knows, that God has reserved to himself the immediate intercourse with the soul of every rational creature: it admits, that he alone judges of the internal conscientious duties imposed upon his creatures; and that to erect a tribunal for determining how far individuals have complied with, or resisted the light of heaven, would be a palpable excess of its delegation, and something very like an encroachment upon the divine prerogative. When it has evidently appeared to the legislature or sovereign power, that a majority of any considerable or distinct part of the community under its jurisdiction concurs in a particular mode or form of religious worship, it is obliged, by the nature of its delegation and trust, to give to the religion of such majority a *civil sanction or establishment*, when called for by such majority: it has no power to judge or direct the consciences of individuals, although it have it in charge to check such immorality, and to promote such morality, as the law and light of nature direct and require; and in doing this, it provides for, and secures the peace, order and welfare of the community.

When our parliament gives *civil sanction* to the Episcopalian Protestant religion in *England*, to the Presbyterian religion in *Scotland*, and to the Roman Catholic religion in *Canada*, the laws, by which these several establishments are set on foot and secured, are all of equal force and validity, and are therefore equally binding on the consciences of all persons, subject to them; not on account of the truth of the religion, to which they give a *civil establishment*; not on account of the intention and views of the legislature in passing them; still less on account of the effect they may produce in forwarding or checking any particular religion; but because they are valid laws of the state, and to such the general ordinance of God enjoins submission. So a conscientious member of the church of *England* living in *Scotland*, is bounden to follow and exercise his own religion, which he thinks true, and at the same time not to resist or oppose the laws, by which the *civil* establishment is given throughout that part of the united kingdom, to the Presbyterian religion, which he may think false. Under the like relative obligation, would a conscientious and sincere Presbyterian be with respect to the Roman Catholic religion at Quebec; and a Roman Catholic in *England* or *Ireland*, though he cannot conscientiously adopt the Protestant religion, is still bounden not to oppose and resist but to conform and to observe the laws, by which it receives the *civil* sanction of the state.

The law is the security of civil establishment.

As the decided majority of this part of the united kingdom are of the church of England, as by law established, endless confusion, disorder and discontent, might happen in the nation, if they had not Protestant churches to frequent, and Protestant ministers to preach and administer to them the sacraments and rites of their own religion. It is the avowed duty of the *civil magistrate* to prevent confusion, disorder, and discontent; and therefore is it, that our parliament, under the existing circumstances, is bounden to give a *civil* establishment to the Episcopalian Protestant religion in *England:* and consequently it may pass *valid* laws for that purpose. Yet although each individual subject residing in *England*, be conscientiously bounden to obey such laws, his conscience is in no manner committed in the truth or falsity of the religion, for the ministers of which a maintenance is by law provided,

A civil establishment may be demanded by a decided majority.

In order to explain this the more fully, let us consider how our Blessed Redeemer acted for our example, in such instances, when upon earth. *Judea* was in his time subject to the power of the Roman Emperor: an idolatrous worship was established throughout the empire. The Emperor himself was looked upon as the *pontifex Max-*

Example of our blessed Lord's paying the tribute money to the heathen emperor.

der a conscientious obligation imposed upon them by God, of obeying the *civil* magistrate in every thing, in which he has the right, and *à fortiori*, in which he is under the obligation of commanding. As all men, therefore, have received equally the same general instinct and impulse from the light and law of nature; and as these are the means, or instruments, by which God has implanted in the hearts of men the general ordinance, which St. *Paul* forbids us to resist, it is undeniable, that the power and duties of the *civil magistrate* are such only, as the light and law of nature will teach and enable him to perform. Thus are divine revelation, dogmatical opinions, and the internal dictates of conscience formally excluded from the resort, competency, power and controul of the *civil magistrate*.

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Nature of advowsons.

At all times advowsons, which, in an inferior degree, are civil rights of the same quality or nature, as the right of nominating to a bishoprick, were objects of the laws of the state: they are both designations of persons or presentations to others for procuring a quality, dignity or power, which it was not competent for the person presenting to confer. In the established church, the *spiritual* jurisdiction is conferred upon the bishop, by an act separate and distinct from the *election*, or *consecration*, or investiture of the temporalities. What properly constitutes a bishop is his confirmation, or, as it is now called, his *institution* or provision: by this he is *invested with divine jurisdiction* over a certain portion of the flock of Christ: "the definitive sentence, or the act of confirmation, by "which the judge, (i. e. the officer of the archbishop) committeth, "to the bishop elected, the care, governance and administration of "the spiritualities. And after election and *confirmation, and not be-* "*fore* the bishop is fully invested to exercise all spiritual jurisdic- "tion. "And again" when a bishop is translated, the former see "is not void by the election to the new one, until the election is "CONFIRMED by the archbishop *;" or in other words, till the elected or nominated have received the spiritual jurisdiction over the diocess, to which he is elected, nominated, or translated. Every mode or form of designing the person, who is intended to be invested with the *spiritual jurisdiction* is a *civil* right. So whether the bishops were elected, as once they were by the clergy and people, or whether to avoid the evils of popular election, they were nominated by the emperors and other sovereigns; or whether they were chosen by the canons and chapters of the cathedral churches; whether they were elected by the letters of *congè d'elire*, as in *England*, or whether they were donative by letters patent as in *Ireland* †, any of these first steps towards the appointment of the bishop to a share in the *spiritual government* of Christ's church, could only be a mode of expressing the wish, desire, or judgment of the laity or *civil* power in favor of the person nominated, presented, or elected.

Institution or confirmation of bishops.

Whence the law presumes the spiritual power to be derived.

The source, from which bishops are supposed or presumed by the laws of *England* to derive their *spiritual* jurisdiction, and thereby to be made *Governors of the church of Christ*, is independent of all *human*, *temporal* or *civil* authority whatever, as will appear evident to any person, who examines attentively and impartially the laws respecting this subject, which are all grounded in this principle, that the source of *spiritual jurisdiction and church government* is completely out of the resort, competency, or power of the *civil* magistrate.

* Burn's *Ecclesiastical Law*, vol. 1. 148. Gibs. 110 God. 25, 26, 27. † 1 Salk. 136.

Nothing can more clearly denote the distinct and separate sources, from which the bishop's title to his *spiritual* jurisdiction and the enjoyment of his temporalities are supposed or believed to flow, than the form of the writ, which when the dean and chapter have elected a bishop without the king's assent, is issued to a person to take the fealty of the bishop so elected without the previous consent of his majesty; which *Fitzherbert**, who wrote in the time of Henry the eighth, said, was *thus in the old Register.* After noticing the circumstances of the vacancy, the election without the king's previous assent, and the adhibition of special favor of the royal assent to the election, it continues, "We have given "you power, that if it happen such election by the metropolitan "of the place to be *canonically confirmed*, and this you by the let- "ters patent of the metropolitan of that place be made to know, "then the fealty of him the elect to us due in this part in our name "you receive, and the temporalities of that bishoprick as the name "is, to be restored: you cause in our stead, &c." By which process it clearly appears that the *confirmation*, or the act, by which the *spiritual jurisdiction* is conferred, is not even supposed to proceed from the king, for he only authorizes his commissioner conditionally to do for him that, which he might himself do, when it shall have been certified to him, that the act collating the spiritual jurisdiction, had been perfected by the person or power competent to grant it. It should be remarked, that the king assumes by this writ, no right of interference with, or control over the act of confirmation; but all that he requires, is, that the metropolitan of the province should either give it or see it given; for to that effect was to be the *certificate*, viz. that the person elected, had been validly and effectually made a governor of the church of Christ, by having a part thereof, viz. the particular diocess to which he was elected, allotted to his care and superintendance. And this act of *confirmation* was wholly distinct from the act of consecration, which might be performed by any three bishops, not even of the province. Thus we see both before and since the reformation, that the distinction has always been kept up by the *laws of the land*, between the collation of *spiritual* jurisdiction and the *election*, *consecration*, and *investiture* of *bishops*.

The different sources of the spiritual jurisdiction, and of the temporalities, proved by ancient writs.

On all hands it is plain†, "that as our laws stand at pre- The church

* Fitzherbert's *New Natura Brevium*, p. 419. I know of no means so effectual to discover the spirit, intention, and nature of a law, as to consider minutely the words and operation of the original writs, by which the law is in fact executed.

† Lesley's *Case of t Le Regale and Pontificale* stated, p. 67, 68.

Independent of the state as to her purely spiritual power.

" sent, the church is wholly independent of the state, as to her " purely spiritual power and authority. *Quod erat demonstran-* " *dum.*"

By the 25th Henry VIII. c. 20. " If any archbishop or bishop refuse to consecrate the person so elected or nominated, within twenty days after election or nomination signified to them by the king's letters patent, &c. he shall incur the dangers, pains and penalties of the statute of provision and præmunire: for it appears to be an attempt to controul and force the *spiritual governors* of the church to exercise their powers even against their judgment and conscience. Whereas if the *spiritual* power be holden independently of all *temporal* power, the exercise of that power cannot in its nature be subject to the coercion of the *civil* legislature. But this very act is the most emphatical evidence, that the legislature of this country admits, that the act of consecration and ordination, and that of confirmation or collation of real *spiritual* power over a portion of the church of Christ, cannot be performed by, nor proceed from the *civil* magistrate. For though the legislature undertake to punish by a *civil* law the archbishop, who refuses to exercise his *spiritual* powers upon an individual (which may be unjust), yet it neither attempts nor pretends to authorize the king or any other person to do it for him: under the assumption or conviction, that no act proceeding from the *civil* power or community can by any possibility constitute a bishop, or a real governor of any part of Christ's church *.

The parliament distinguished between the civil and spiritual power.

The parliament of that day was not inattentive to the difference between the *civil* and *spiritual* powers: for as the designation of the Person, who was intended to be presented to the archbishop for institution, confirmation, consecration or ordination, was a mere *civil* right, so it provided that in the case of the dean and chapter " deferring the election above 12 days after the receipt of " the said license and letters missive, then the king shall nomi- " nate; by his letters patent, such a person to the said office and " dignity, as he shall think able and convenient for the same, " and the king shall appoint the archbishop with two other bi- " shops, or if there be no archbishops, then four bishops to conse- " crate and invest the person so nominated or elected." Here the appointment by letters patent is substituted in lieu of the election by the dean and chapter, and is equally effectual for the purpose of designating the party to be confirmed and consecrated, but such

* Upon this principle was it said, in the case of *Powle* v. *Godfrey*. 1 Rol. Rep. 64. *that no action* on the case will lie against a bishop for not *instituting*; *quod fuit concessum per curiam.*

appointment would not substitute the acts of *confirmation and consecration*: and therefore the legislature attempted it not. By inflicting a punishment upon the archbishop for refusing to exercise power in a particular manner, and by not supplying the effects of that refusal by any other means, the legislature indirectly avowed, that the archbishop possesses the exclusive right or power of doing that act; by which the spiritual jurisdiction is conferred; for if the act itself were within the control of the *civil* magistrate, and he wished it to be done, it is evident, that he would have directed or empowered some other person to do it, upon the refusal of the archbishop. In countries where the christian religion has a *civil* establishment, and temporalities or civil advantages are annexed and appropriated to bishopricks, it rarely happens, that bishops are made against the will of the *civil* magistrate. This proves the prudence, with which the *spiritual* power is exercised; but establishes, with precision, in whom the sole right, and consequently the liberty of exercising it, is vested.

Confirmation of bishops made by the archbishop since the reformation.

At the Reformation, no alteration was attempted to be made, *in the mode* of conferring *spiritual* jurisdiction: it was only prohibited by the 25th Henry VIII. to derive it from the See of Rome. The act of *confirmation* had till that time been the publication of the pope's bull, by which he conferred the spiritual jurisdiction: which act of confirmation was after the reformation continued to be required from the archbishop, who was to "confirm the said "election, and to invest and consecrate the person so elected, to "the office and dignity that he is elected unto, and to give and "use to him such pall, benedictions, ceremonies, and all other "things requisite for the same, without sueing to the See of *Rome* "in that behalf."

Investiture of the bishop.

After this follows a pure civil ceremony, viz.* "The bishop "being introduced into the king's presence shall do his homage "for his temporalities or barony by kneeling down and putting "his hands between the hands of the king sitting in his chair "of state, and by taking a solemn oath to be true and faithful to "his majesty, and that he holds his temporalities of him."

Having thus endeavoured to trace to their original sources the effects of the spiritual and temporal powers, in order to discriminate between the *civil establishment* given by the state or *civil* magistrate to the ministers of a particular religion, and that power or authority, (*the power of the keys*) which by the constitution and

* Burn's Ecclesiastical Law, vol. 1. p. 151.

laws of *England divinitùs commissa esse dignoscuntur*, order and consistency might appear to call here for a clear statement of the specific nature and objects of that *spiritual* power in church governors, which enables them to command, and directs and obliges the *governed* (that is those who profess to admit it) to submission and obedience: but as this is a matter merely of conscientious obligation, it is not only out of the resort of the *civil magistrate to enforce*, but foreign from the department of a lawyer to discuss. It falls within the province of the ascetic and divine to furnish spiritual instruction and exhortation to the devout christian *.

The state invests the clergy with corporate rights.

The *civil* magistrate in *England*, since christianity has been the prevailing religion of the *English* nation, has thought fit to form an alliance with the church, or in other words, to clothe her ministers with certain rights, immunities, and advantages in the state, to which their mere spiritual capacity or divine mission cannot entitle them. This civil sanction or establishment is intended to support and enforce the duties of christianity by temporal means, which with the assent of the community may be done, and, when enacted as laws, bind each individual conscientiously to submit to them, as well as any other laws of the community, in which they reside: but all human laws impose no other than a local obligation, whilst the individual bounden by them resides within the jurisdiction of that legislative power, which enacted them.

The most essential part of this establishment consists in the maintenance, which the state has thought proper to allot to the clergy, and in the corporate capacity with which some of them are invested. This brings us to the consideration of the nature of tithes, and other church property.

* The learned and eloquent Bossuet has thus expressed himself upon this subject: "Thus the catholic church speaks to her children: ye are a people, a state, a society; "but Jesus Christ, who is your King, holds nothing from you: his authority is of a "higher origin. You have no greater right to say, who shall be his minister, than "you have to appoint him to be your sovereign. Thus your pastors, who are his ministers, derive their title from the same high source, that Christ himself does: And "it is essential, that they should be placed over you by an order of his appointment. "The kingdom of Christ is not of this world, nor can any adequate comparison be made "between his kingdom and the kingdoms of the earth. In a word, Nature affords us "nothing that bears a conformity with the spiritual kingdom of Christ: nor have you "any other right, than that which you find in the laws and customs immemorial of "this society. Now these are from the times of the apostles down to the present times: "that the pastors already constituted should constitute others. Choose ye, says the "apostle, and we shall appoint. It was *Titus's* business to appoint the pastors of *Crete*, "and it was from *Paul* appointed by *Jesus Christ* that he received his power."

BOOK I.—CHAP. II.

Of the general Nature of Tithes, and other Ecclesiastical Revenues.

IF there never had existed a *civil establishment* of the christian religion, our ideas of the *spiritual* and *temporal* powers would not have been confused, but clearly and distinctly marked. During the three first centuries of christianity the true religion was generally persecuted by every state, but sanctioned or supported by none; an irrefragable argument that *civil* sanction was necessary neither for the establishment nor the continuance of christianity. Some respectable and learned men have considered *civil establishments* hurtful to the real interests of religion; others have thought them serviceable, if not absolutely necessary. *Non nostrum est*, to moot the question.

Civil establishment of religion not necessary for the sanction or support of the christian religion.

The first, and in some senses the most important effect of a *civil* establishment of religion, is the provision or revenue allotted to and settled upon the clergy or ministers of that religion as their fixed estate. The idea of *God's not having granted any power to the rulers of the realm over the church or its property*, has been too fondly cherished, by some divines, not to require some investigation and discussion. According to the received or assumed doctrines of the established church of *England*, the church of Christ is a body, or society of believers in his doctrines governed by the spiritual successors of the apostles. It follows then, that it could never have acquired in its aggregate or corporate capacity any attribute, right or power, which Christ did not give to his apostles, to be perpetuated through their successors, till the end of time. Whether, therefore, I speak of the *spiritual* power of the church, (it can possess no other) as possessed and exercised by the apostles themselves, after the ascension of Christ into heaven, or of the bishops of that same church in the 19th century of the christian establishment, it is one and the same thing. The whole *spiritual* power they have or claim, is derived from the same source, is of the same nature, extends to the same objects, is communicated to them by the same means, and produces the same effects: it is *spiritual* and not *temporal*: every man, with the use of reason, has full evidence, that the possession, transmission, and use of property, is the immediate object of *civil* or *human* legislation: it is given, regulated and transmitted in every state in some different

A settled provision for the clergy is the first effect of the civil establishment of a religion.

Property is the creature of the *civil* power.

manner: it is so essentially the creature of the *civil* power, that where there are no laws, there can be no property. Temporary occupancy may give a temporary use, but no permanent and exclusive dominion, which alone constitutes property. It is consequently evident, that the possession, transmission, use, or application of property in any particular state cannot be affected, but by the interference or controul of the legislature of that state. But if the power given by Christ to the apostles *to teach all nations* invested them with a right to alter, model, resist, repeal, or counteract the respective municipal laws of the different nations, to which they were commissioned to preach the revealed word of God, then would christianity have wanted one of its essential characteristic qualities, which is its universal aptitude to every possible form of *civil* government. Every christian, who reflects upon this subject must necessarily conclude that the *spiritual* or *ecclesiastical* power (which alone the church lays claim to) can make no law whatsoever which can vest, divest, transmit, qualify, apply, or dispose of *temporal property*. In whatever instance the church, or church governors have undertaken to do it, they have exceeded the powers given to them by Christ, and encroached upon the *temporal* or *civil* power of the state, which must cease to be supreme, if it can be controlled; and if it be not supreme, it will cease to answer the ends of society and government, for which God instituted it from the beginning.

The church lays no claim to dispose of property.

The advocates for the *jure divino* right of churchmen to their property usually lay much stress upon the punishment of *Ananias* and *Sapphira*, to prove that all property given to the church, becomes, from the moment of the gift, transferred from the control of the *civil* or *temporal* to that of the *spiritual* or ecclesiastical power. The very possibility of such a transfer, according to the principles laid down, is absolutely to be denied. The unauthorised disappropriation of such property by an individual is sinful, because it is a breach of the commandment of God, *Thou shalt not steal*. But he must be inattentive to the facts of this history of *Ananias* and *Sapphira*, who pretends from it to establish the inalienability of church property. If the sacred text had merely narrated the facts and the punishment, there might have existed a doubt about the immediate cause of the punishment; but it particularly specifies the cause, for which they were punished. "Why hath *Satan* "tempted thy heart that thou *shouldst lie to the Holy Ghost*, and *by* "*fraud*, keep part of the price of the field?" He is rebuked for *lying and fraud*, not for withholding a part of the money from

How the judgment upon *Ananias* and *Sapphira* is to be understood.

those, who had any right to claim it, but for attempting to pass off a fraud or cheat or deceit upon others, by assuming the merit of a larger voluntary contribution, than in fact he had made. It was not upon the score of injustice or sacrilegious appropriation of a fund consecrated to the Lord, "for whilst it remained, did "it not remain to thee? and being sold, was it not in thy pow-"er?" There could be no injustice then in withholding what was in his power?

How a title to property is to be deduced.

In tracing the title and establishing the right to any property whether it be real or personal, moveable, or immoveable, it is essentially requisite to consider first the nature of the property itself; secondly the means of transmission; and thirdly the quality, aptitude, or capacity of the persons who convey, and of those, to whom the property is conveyed, or, as they are technically called, the *donors and donees, grantors and grantees*. By property I understand the exclusive right, use, and possession of matter, substance, or benefit, by which one individual enjoys and shuts out every other person from the right, use, and possession of that same matter, substance, or benefit, and moreover possesses the faculty of transmitting it in like manner to others. The expediency, advantages, and even necessity of property in the state of society, arise not out of the nature of the matter, substance, or benefit, of which the particular property consists, nor from any intrinsic or extrinsic quality or power in the nature of the possessor of it, by which he differs from those, who possess it not; nor are we to look into the particular *justice*, which a modern writer says, "is the criterion, that "must determine, whether this or that substance capable of con-"tributing to the benefit of a human being, ought to be considered "as your property or mine *." For it would be impossible to find out the particular justice, by which one man enjoys a large fortune, and another is deprived of the necessary means of subsistence; by which the rich man is exempted from the punishment inflicted upon mankind, "in the sweat of thy brow shalt "thou eat thy bread," whilst the poor labourer by that very sweat of his brow can scarcely support himself and family. But an all-wise Creator having formed the earth to be inhabited and enjoyed by *social* man, has by the order of that same providence instituted the general necessity of private property for the preservation of society, in the same manner he instituted the necessity of *civil* government; but as to the modes, forms, and conditions of

* *Godwin's Political Justice.*

making the distribution of property, to the enjoyment of the few, and the exclusion of the many, and of transmitting it to others even after death, all was left essentially to the will of each community. So it was upon the general necessity of the thing, that God engrafted that commandment, "thou shalt not steal." That is, thou shalt not appropriate unto thyself any of that matter, substance, or benefit, of which the laws of thy community shall vest the property in another. Every particle therefore of matter or substance, which can by possibility be converted to profit or use, and any right of nomination, election, appointment, honour, dignity, or other incorporeal civil right, benefit or advantage, which can produce a price or value, will fall under the larger acceptance of the term *property*, which, therefore, is the immediate creature of the state.

No other than a derivative title can be now set up to permanent property in this country.

No man can at this hour claim in this country a right to any property of a permanent nature, which he has not received by transmission or derivation from some other person, who preceded him in the right, use, and possession of it. All the means of acquiring property are instituted and established by the laws of each state. By our laws some sorts of property cannot be alienated at all by any act of the individual: but the law reserves to itself the sole operation of casting the descent of it upon a certain individual, under certain conditions, in a sort of perpetuity, and regular succession. It now enables individuals to transmit, by particular modes, that property, which was before absolutely unalienable. Hence flows a general deduction, that there is no power upon earth, but the *civil* legislative power of each community, that can determine what shall be private property within that state, and how it may be acquired, enjoyed, possessed, transmitted, and conveyed to others. The sure criterion, therefore, by which a christian may determine what is private property, is to ascertain how far the act of appropriating it to one's self becomes an infringement of the commandment, "Thou shalt not steal." For the commandment can only in its nature apply to the violation of a *civil* law of the state: for such alone can constitute property. Thus, as I before observed, the conscience of the thief is immediately affected by the breach of the commandment of God, who can alone bind the conscience, not by the *civil* or *human* power of the state, which cannot of itself, immediately or absolutely, impose any binding quality upon the conscience.

A christian knows what is property by the bearing upon it of God's commandment, *Thou shalt not steal.*

As property is essentially the creature of the *civil* power, it follows, that the donors and donees of it must be ascertained and ca-

pacitated by it. The only condition, which is absolutely and indispensably a necessary quality in both is, that they should be subject to or resident in that state, by the laws of which they are enabled either to give and transmit, or to receive and enjoy the property. Since they receive their capacity or power of giving and taking property from a particular state, it is repugnant, that they should be wholly independent of that state, the laws of which actually operate upon them. Now, as all particular *human* power is A DELEGATION FROM THE COMMUNITY, which constitutes it, it cannot extend to, or in any manner affect, members of another community, who joined not in that particular delegation. From these premises follows this negative consequence, that *property* is not an object of the *spiritual power*, which Christ gave to his apostles, for the purpose of establishing, governing, and perpetuating his church, to which he promised existence till the end of time, and which he invested with the peculiar attribute of universality.

Members of one community cannot be bounden by the acts of another separate community.

Church lands and ecclesiastical property are so called because they are appropriated by the state to holy and pious uses, not because they are taken out of the controul of the *civil*, and transferred to that of the *spiritual* power. Of those persons, whom the laws of this country enable and capacitate to acquire, hold, enjoy, and transmit property, some are so enabled in their individual, some in their corporate capacity: but whatever capacity or quality they acquire, which thus enables them to take, hold, or transmit property, from the *civil* power alone can it proceed.

Ecclesiastical property, so called from the appropriation, not from the nature of it.

The law of England at present knows not that *civil* death which formerly it induced upon a person entering into religion, by solemnly vowing obedience, poverty, and chastity. All religious persons, men or women, were in their individual capacity totally incapable of taking or holding any property whatever. Yet the law allowed them, if they became superiors of houses, to take, hold, enjoy, transmit and defend the property of their respective houses or convents in their *corporate* capacities. At present all corporations, whether sole or aggregate, ecclesiastical or lay, are entitled only in their corporate capacities to their property; but this *corporate* capacity prevents no man from taking property in his individual capacity, though religious persons were formerly incapacitated by law from taking any property. Religious vows and the *spiritual* acts of *ordination and institution* are not subject and liable to the controul of the *civil* power: they consequently can receive neither validity nor effect from the state; yet the persons

What was the *civil death* formerly recognized by our laws.

who after these acts become either corporations, or civilly dead, acquire their corporate quality or their *civil* death merely from the laws of the state. Thus formerly in England (as I presume it would also be at present) an alien might validly receive the episcopal order by consecration, and *spiritual jurisdiction by confirmation*, without thereby becoming capable of taking his seat in the house of lords; for, I presume, that without an act of naturalization an alien bishop could not legally take, enjoy, or defend the lands and revenues of his bishopric, nor become seized of the barony, by virtue of which he would become entitled to his seat upon the bench in parliament. The spiritual power then, from which both episcopal order and jurisdiction proceed, gives neither the property nor the capacity of taking or holding it.

An alien bishop could not sit in parliament.

There is a wide difference between the states vesting property in an individual clergyman in a particular manner, and under certain conditions, and the church of Christ acquiring the possession or dominion of property. If before the reformation an eighth of the landed property of England belonged to the church, or more properly speaking, to ecclesiastical or religious persons; yet no act of the pope, even at the head of a council, composed of every bishop in the christian world, could in any manner either appropriate, alienate, charge, incumber, dispose of, or affect one inch of the land, or one farthing of the revenue proceeding from it, or apply or settle it otherwise, than as it was fixed by the laws of England; nor at present could all the bishops of England, in full convocation, by any canon, order, act, or decree, in any manner affect the possession, use, enjoyment, disposal, or transmission of the produce of the smallest living in the kingdom.

The ecclesiastical power in its utmost plenitude cannot dispose of any ecclesiastical revenues.

No *spiritual* or *ecclesiastial* power upon earth can of itself make a valid and binding canon law to affect in any respect a thing or person, which, in the same respect, is an object of and can be affected by the municipal or civil law. All property, moveable and immoveable, substantial and incorporeal, being the creature, is necessarily the object of the *civil* law. If then the *canon law* or *spiritual power* could lawfully dispose of or affect property, it would be *dependent upon the authority and will of the temporal legislature*; but it has no more power over such objects, than the human legislature has over the *soul*, *conscience*, or other objects of pure spiritual jurisdiction; and the attempt is an invasion and encroachment upon the *civil magistrate*, without whom the whole code of *canon* law, that concerns and affects *such* objects, is a blank letter. Christ gave no power over property to his apostles; nor did he give any

The canon law dependent upon the municipal law as to any object of temporal power.

thing like a promise, that their successors should not at any time encroach upon, invade, or usurp rights, which he never gave to them; for this would be a species of impeccability, which the most fervent advocate for the rights of the church, has as yet never pretended to attribute to church governors, either collectively or individually.

The civil magistrate has power over all churchmen and church property.

I attribute not to the *civil magistrate* powers over the church, though I do attribute to him power, as well over all churchmen within the realm, as over all the property of such churchmen: the church of Christ, however defined, being a collection of believers in the revealed truths of christianity, is not dissected nor divided by geopraphical boundaries; it is incapable of possessing property, which by its essential nature must for ever be under the express controul of the rulers of that state, where the property is situated.

The donation or application of temporal property to pious uses by the state, or by individuals, through the permission of the state, works no alteration on the nature of the two powers, or the respective objects of either. "*Le droit aux revenus est dans l'ordre civil et de la competence du prince. La consecration que l'on a faite de ces biens, ne les a pas tirès de sa jurisdiction, parcequèlle n'a pas changé la nature des choses* *." Upon the immutable quality or essential nature of property, I ground the absolute impossibility of its ever becoming the object of the *spiritual* power. The *civil* power may indeed offend against prudence, policy, and justice, in the use or exercise of its dominion over property; but it cannot exceed its limits when it acts upon property. On the other hand, to whatever laudable purpose the *spiritual* power should attempt to direct, apply, or appropriate property, it would essentially exceed its limits, and the act would *ex vi suâ*, be null and void against all mankind; for the real spiritual power only holds and claims its rights *jure divino*: what God never gave to his apostles, his successors can never have since acquired: for the rights accruing or claimed through such succession are those only, which the apostles possessed by the special gift of their divine master, amongst which there was not a right to take, hold, qualify, enjoy, or transmit property independently of the *civil* magistrate. The dominion of temporal property was no part of the charter, commission, rights, or powers given by Christ to his apostles, and transmitted by the spiritual generation of pastors to the present existing governors of his church: on the contrary, the very essence of temporal property

The civil power in acting upon civil property exceeds not its limits. The *spiritual* power in so acting exceeds its competency.

* *Pey Les Deux Puissances*, vol. 2, 135.

consists in its being subject and liable to the controul or supreme dominion of the *civil* magistrate, as it essentially is the creature of society, qualified and modelled by the civil power of each particular state.

No prescription to be set up against the nature of things.

The invasion, encroachment, or usurpation of a right, neither justifies the exercise of it, nor renders the act licit or valid: nor can such an encroachment of *civil* rights by the church, or of *spiritual* rights by the state be aided by prescription; for no length of time can alter the nature of things, and upon the essential nature of things, rests solely their liability to the controul, either of the *spiritual* or *temporal* power: the several and respective rights of both powers are inalienable, imprescriptible, and indefeasible.

Divine laws not under the controul or disposal of the *civil* magistrate.

The observance and violation of *the law of God* are objects of serious and conscientious attention to every human being. The *civil* magistrate, however constituted, cannot authorize the breach or dispense with the injunctions of the law of God. I state with confidence that no property has been holden *jure divino* since the cessation of the theocratic government of Jewry, and the consequent appropriation of the land of Promise; that no property, in the present system of social nature, can by *divine right* be absolutely inalienable: that the church of Christ cannot command the application of property, because Christ delegated no such power to his apostles: that it cannot superintend the observance of the *civil* or *municipal* laws of different states, which regulate property, without interfering with and controlling the *civil* or *temporal* power (although it be allowed on all hands that the *temporal* and *civil* powers are each of them supreme and absolutely independent upon each other); and supremacy and independence formally exclude superintendance and controul.

General nature of church property in this country.

My design is not to enter minutely into a detailed discussion of the different sorts of church property, but to establish upon a broad unquestionable principle the general nature of every existing species of it in this country, in order to shew more satisfactorily, that none of it derives its origin from the *spiritual* power, and that it is not supported, nor can be affected or controlled by the pure *spiritual* power. Under this general idea of church property I comprehend every species of property, which ever has been, since the foundation of christianity in this country, appropriated to clerical or religious persons, and made applicable to their support or maintenance, or to what were formerly called *pious* (though by later statutes termed *superstitious*) uses; and all payments, which may be legally required and forcibly levied upon the individual by or for ecclesiastical persons. Such are oblations, observations, offer-

ings, prestations, pensions, and all other church dues; land, glebe, tithes, and other corporeal and incorporeal hereditaments. It is distinguishable from *temporal* or *lay* property, not by any difference in its nature or essence, but by its intended appropriation to spiritual or ecclesiastical persons and purposes, and by its descendible quality to successors in their corporate capacity. When I say that the *spiritual* power has neither right nor controul over it, I am far from wishing to suggest, that the *civil* magistrate is free to disappropriate unjustly or wantonly any church property, and to divert it from a laudable and pious to a pernicious or criminal, or even an indifferent end.

What are the conscientious duties of the *civil magistrate*.

The *civil* magistrate has his conscientious duties with reference to every part of his delegation or trust, which is generally to preserve and maintain the peace and welfare of his delegators, who are the community subject to his power. The wanton disappropriation, and subsequent criminal application of the property of any lay foundation, or of a simple individual, would be unjust on the part of the *civil* magistrate, and consequently sinful in the sight of God; but the act would bind the community, because all property is essentially subject to the supreme *civil* power, and must vest in the individual, to whom the state annexes it: for after the law of the state has once vested it in an individual (no matter for what motive or what cause) every act to disappropriate it from that individual by any private person whomsoever, becomes an infringement of the commandment, *thou shalt not steal*. This commandment can only operate with reference to such things, as the state gives the exclusive use and possession of to certain individuals, as if it had been said, thou shalt not take unto thyself that, which the state has given to another, or forbidden thee to possess. But no act of the *spiritual power* can so divest and vest property, as to affect the operation of this commandment of God upon it. Trifling dislikes, but little disregard, perhaps no irreverence would have ever existed in the minds of any towards the established clergy, had they never asserted rights beyond the demarcation of their own sphere, or assumed any other claim, power or authority independently of the community, than such as they claimed *jure divino*, or as before had been observed, *quæ divinitus eis commissa esse dignoscuntur*. I desire to promote, not to check the respect, which is due to church governors and ecclesiastical ministers.

By what right tithes are payable in England.

Let us consider by what right tithes either now are, or at any time were paid in England. I presume it to be the common belief of the English Nation, that besides the general reason, policy, and

exigency of the thing itself, our blessed Lord has especially ordained, that the ministers of his gospel shall be maintained by those, to whom they administer the word of God. "Know ye not, "that they, who are employed in sacred functions are fed from "the temple, and they that serve the altar partake with the altar?" So also hath the Lord ordained, "that they, who preach the "gospel should live of the gospel*." ——— It was a positive ordinance, and of course binds the conscience, and obliges every christian to compliance and submission. There is therefore an universal and indispensable duty and obligation upon every christian to contribute out of the property, which he has at his disposal, so much, as will be his proportionate share, towards maintaining and supporting the church governor and his ministers, to whom the individual owes spiritual submission, in respectable ease, above want, and out of the necessity of diverting their minds from the objects of their *spiritual* function, to the cares and anxiety of temporal concerns.

The gospel ordinance to maintain the ministry.

It is assumed, that the gospel obligation attaches upon every christian equally throughout the universe, wherever the necessity or occasion of it arises: that this necessity or occasion is the poverty or indigence of the particular spiritual minister, superior or governor, to whom the individual acknowledges spiritual obedience to be due: but this obedience is not unlimited: it extends not to every minister of the gospel, who is in holy orders, or who possesses some limited *spiritual* jurisdiction. All *spiritual* jurisdiction must essentially be stinted and restricted to certain limits or boundaries, excepting that universal jurisdiction, which before the reformation this country generally allowed to the bishop of Rome, as to the supreme pastor of Christ's church upon earth. Upon the denial or rejection of this universal supremacy the basis of the reformation stands. Spiritual obedience or submission then is commensurate with the jurisdiction of the person, to whom such obedience or submission is due, which is necessarily bounded and confined to certain geographical limits, be they of a diocess, parish, or other division. The duty lies indiscriminately and unexceptionably upon all christians allowing the jurisdiction; the performance of it arises with the occasions of the want or indigence of the individual minister, who has received and exercises that *spiritual* jurisdiction over them, to which they acknowledge submission. Man may be humane, beneficent, and charitable to many, but he can only comply with this evangelical ordinance by contributing to the

What particular persons are entitled to the gospel maintenance.

* 1 Cor. c. IX. 13, &c.

maintenance of that particular minister, to whom he owes submission and obedience: St. Paul spoke of such voluntary and charitable contributions, when he said, "For it hath pleased them of "Macedonia and Achaia to make some contribution for the poor "saints, that are in Jerusalem; for it hath pleased them, and "they are thus debtors *." The difference is striking between ὁ Κυριος διεταξε and ηυδοκησε γαρ. The Macedonians and Achaians were not bounden by the ordinance of Christ to contribute to the ministers or others at Jerusalem; therefore he says, *it pleased them.* The catholicity or universal aptitude of the christian religion to all forms of *civil* government would render a general treasury fund or fiscal repository of ecclesiastical property for the universal church, impraticable in the new law, though such were made at Jerusalem in the old. To this we must add the impossibility of any *spiritual* corporation or representation of the church of Christ acquiring in that character the dominion of any specific property in lands, goods, or money, or of transmitting them by means of spiritual generation to their successors, who as such must essentially possess the qualities, powers and rights of their predecessors, and none other.

An universal fund for the church incompatible with the Christian religion.

This, like every other evangelical precept, must be unchangeable, universal, and perpetual. Our ancestors could do nothing either to enforce or weaken the obligation; it is at this moment equally binding upon the existing generation of christians, as it was upon those of the first century. But the actual and immediate obligation of observing the precept or ordinance, arises out of the particular occasion of the neediness of the particular lawful pastor or minister. This may change, alter, or vary, indefinitely, as to persons, times, and circumstances.

How the gospel ordinance for supporting ministers applies.

A patron of a parish, by possessing an ample fortune, may by applying a part of it to the maintenance of the minister remove that occasion of neediness and want, which would have obliged the parishioners to contribute towards the maintenance of such needy minister, in obedience to the precept. Upon this principle most christian states have, in process of time, applied, or permitted to be applied, certain funds and lands to the maintenance of the ministers of the gospel, in order to remove the occasion, and consequently the obligation of these contributions, which might, particularly in numerous congregations, be attended with hardship, difficulty, litigation, differences, and sometimes with dislike and disrespect for the minister himself. But this removal of the occasion affects not the nature of the ordinance, which operates upon

* Rom. xv. 26.

The gospel ordinance falls neither upon the *quantum* nor nature of any specific property.

every christian, in every situation and on every occasion, in which his *spiritual* superior, or the person to whom he owes his *spiritual* obedience happens to be in want. The precept falls not absolutely upon the property, either as to the *quantum*, or as to the nature of it. It would be frivolous to suppose, that a christian possessed of 10*l.* per annum in landed property, was obliged by this precept to contribute or pay twenty shillings per annum to the support of his spiritual minister of the gospel, and that another christian subject to the same minister receiving out of the funds twenty thousand pounds per annum, should not be bounden by this precept to contribute or pay one shilling towards his maintenance. Neither does the precept absolutely or unconditionally attach upon the individual: otherwise the condition or situation of the minister could not alter the obligation. If the obligation were absolute and unconditional, no property or provision secured to the individual minister could exempt the parishioner from the obligation of the precept: it would in such case be positive, either to pay something annually, or a given portion of his general property to, or for the use of his spiritual governor or particular minister. It does not follow, because the divine ordinance binds every christian to contribute to the support and maintenance of the minister, who has jurisdiction to administer the gospel to him, whenever he is in want, that such minister therefore has a *divine right* to that particular property, by the possession of which he is kept from want, and which prevents the obligatory operation of the ordinance from falling upon his parishioners. The specific possessions of the ministers of the gospel must essentially be holden by *human* right. Thus for example: if a bishop and parish priest be supplied with an honourable and easy maintenance by some opulent individual, or if they be entitled by the state to a portion of land or money, in either of these cases the evangelical precept binds not the christian residents within that diocess and parish, because the occasion for its observance arises not. The obligation of the precept is not to deprive one-self of a fifth or a tenth of one's property, nor to give any specific part of it to our spiritual superior; but to contribute proportionably with the rest of the congregation or parish, over which the spiritual jurisdiction of the minister extends, towards keeping that minister in honourable decency and comfort, out of distress or the necessity of diverting his attention from the duties of his ministry to the calls of temporal or worldly concerns. But no man will pretend, because a person has spiritual jurisdiction over a part of the church of Christ, that he therefore has a divine

Nor upon the individual subject to the obligation.

right or title to such specific donations of a founder, or the particular provision settled upon him by the state. Yet the revocation of such donation or the subtraction or want of any such settled maintenance, would give him immediately a *divine* right or title to the general gospel maintenance, by contribution amongst those, over whom he possesses *spiritual* jurisdiction.

How in St. Paul's days the gospel ordinance operated.

When St. Paul had expressed the positive obligation of christians maintaining their ministers "so also the Lord ordained that they, who preach the gospel shall live by the gospel" he reminded the Corinthians of the *divine* right and claim, which *they* had to a maintenance, who administer the gospel unto them: yet he immediately added, that he had not personally stood in need of any such contributions from them. But "*I have used none of* "*these things.*" He is as explicit as he can be in mentioning the cause or consideration, for which the spiritual minister of the gospel is entitled to his temporal maintenance or support. "If we have "sown unto you spiritual things, is it a great matter if we reap "your carnal things*?" And although on all occasions he reminded the faithful, and strongly inculcate the ordinance of Christ to them to provide for their ministers of the gospel, and the right of ministers to demand and call for such maintenance; yet he himself, where the occasion would allow him, prevented the obligation, which the faithful were under o fsupplying his and the wants of those labourers in the gospel under him, whom he found requisite for the work of the Lord: not that he was under the obligation of so doing; for if *he* had been so obliged, his successors would still be so at this day, "Neither did we eat man's "bread for nothing, but in labour and in toil working night and "day; lest we should be burthensome to any of you. *Not as if* "*we had not authority:* but that we might give ourselves a pat-"tern to you to imitate us†." Thus did this great apostle give the brightest pattern of evangelical perfection in loving his flock, by easing them of a burthen, which, had he not prevented his own wants by his manual labour would have fallen upon them to supply; and in encouraging them to honest industry by his own example, to which the remainder of that epistle strongly applies. This same tenderness for his flock, which he expresses to the Thessalonians in this epistle, he also enlarges upon in the discourse to the ancients of the church, whom he sent for from Miletus to Ephesus‡. "I have not coveted any man's silver,

* Cor. xi. † 2 Thess. iii. 8 ‡ Acts, xx.

" gold, or apparel, as you yourselves know: that as for such " things as were needful for me, and them that are with me, " these hands have furnished." Here the apostle foreseeing, in the frailty of human nature, that since by God's ordinance the administration of the gospel entitled the minister to a *temporal* support or maintenance, (which he elsewhere spoke of as *burthensome*) the person entitled, as well as he that should be obliged to contribute, might be actuated by covetousness, which on either side must be productive of mischief; he manifested by his own example how desirable a thing it ever would be, to prevent by proper means the necessity of the minister's calling upon the faithful individually for their support and maintenance; for under the actual want alone of the minister would the faithful be obliged to contribute their quotas in obedience to the divine ordinance. Upon these reasons and the example of this apostle stand the commendable and proper grounds, upon which christian states and opulent individuals have contributed and established independent maintenances for the ministers of the gospel: but the property so appropriated alters not its nature; it remains as it always was, subject to the supreme controul of the state; and is no more holden by the clergy *jure divino*, than the lay patron holds his right of presenting a clerk to the *bishop*, or the manor or land, to which such right may be appendant.

How the gospel ordinance may be suspended and revived.

The gospel ordinance to all christians for supporting their respective ministers when in want, must oblige and bind them unexceptionably, whilst christianity endures, and give the minister a *divine right* to be properly supported: but the different circumstances, which prevent the occasion of complying with this evangelical ordinance, are in their nature various, accidental, temporary, partial, and always extrinsic to the ordinance itself. They rest upon the *civil* power of the state, which gives a permanent and a successive quality to property thus appropriated, upon the disposition of founders or voluntary contributors towards the maintenance of the gospel ministers, or upon the exemplary act of supererogation of the pastor, who may if he please, like St. Paul, prevent the compliance with the ordinance from becoming burthensome to his flock by the labor of his own hands, or the appropriation of his private patrimony, if he have any.

In order to determine justly the right, which one person has to receive and another the obligation to pay, we must first look into the nature of the claim, which must exist in some one or more individuals, and then examine the circumstances, which

render the claim operative and effectual against other individuals. St. Paul has expressly said, that the "sowing of spiritual things "gives right to reap carnal things, and that those, who are of "the altar are to live by the altar." Now no one can have a right to sow *spiritual* things, and to administer to the faithful at the altar, without apostolical mission or true and valid *spiritual* jurisdiction, which I have endeavoured before to shew cannot be conferred by the *civil* power, but is holden by a higher title. The claim, which by divine right a *governor* of the church of Christ, and those whom he employs under him in the ministry, have to a gospel maintenance operates only upon those, over whom he has a mission, "to whom he sows the spiritual things:" and this attaches upon his whole flock equally, proportionably, and unexceptionably, wherever the necessity of the contribution arises. But the divine right to this contribution of a minister's own flock under the actual necessity of the case obliges neither legislators nor individuals to supply the means of preventing that necessity from falling upon any particular flock. Christ's ordinance was to the faithful to provide in case of need for their own *spiritual governor or minister*, not to states or individuals to prevent that ordinance from becoming, as St. Paul says, "burthensome to others." Nothing certainly can be more laudable and desirable, than a regular fund appropriated to the support of the ministers of the gospel, in order to prevent the necessity of individuals contributing towards it *pro ratâ*, in compliance with the injunctions of the ordinance: but every fund so appropriated still retains the nature of the property, of which it consists; and this essentially is to be a creature of the *civil* power and consequently to be under its controul; it cannot then be inalienable by the *civil* power. The absolute inalienability of property would take it out of the controul or power of the *civil magistrate*: and yet there can be no other disposition of property but mediately or immediately by the supreme power of the state, which is that of the *civil magistrate*.

How the immediate right to the gospel maintenance is to be traced.

The consequence of these premises is, that the divine ordinance for maintaining ministers of the gospel extends only to those particular church governors and ecclesiastical ministers, to whom the duty of *spiritual* submission and obedience is due; that the temporalities of bishops, and tithes and other maintenances and stipends of their inferior clergy, whom they institute or appoint to work in the vineyard under them are established by the state, in order to prevent the operation of the precept upon individuals. But this idea of substitution or prevention is only applicable to such church lands,

Spiritual jurisdiction alone gives right to gospel maintenance.

revenues, or immunities, as are possessed by those, who might without them have claimed the benefit of the precept: and nothing but real *spiritual* jurisdiction, as we have seen can support this claim. A great part of church lands in this nation formerly belonged to abbeys, monasteries, and convents of religious men and women, who having no mission to administer the gospel to any particular set of christians, had no *spiritual* jurisdiction over any part of the flock of Christ, consequently no divine right or claim to a maintenance under the christian ordinance. The lands therefore, which they possessed exempted no individuals from the necessity of contributing to their minister in case of distress and poverty; for the appropriation of ecclesiastical property can only operate as an exemption from the precept, when the provision is immediately applicable to the person, to whom the divine right or claim would otherwise have accrued. Hence it follows, that all ecclesiastical property or church revenue is a part of the national fund; and the *supremum et altum dominium* of it is in the supreme *civil* magistrate of each nation, as trustee for the nation. Such *civil* magistrate is obliged to apply the fund in such manner, as the nation wishes and directs; so as thereby to promote and preserve their happiness and welfare, which is the sole object of his delegation or trust. Almost all theological writers hold, that ecclesiastical immunities are not holden *jure divino*; but *jure humano*: that is, were granted to the clergy by the state; without which grant therefore they would not have been entitled to them. But what mean these immunities? That the clergymen enjoying them shall be exempted from contributing out of their livings to the exigencies of the state, by paying taxes and other impositions. Now the power or right of levying taxes, is that of diminishing the property, out of which they are levied: but no one can diminish property, but he who has the supreme dominion over it: therefore, if the *civil magistrate* can diminish when and how much he thinks proper out of the revenues of the church, it is a demonstration, that he enjoys the supreme dominion over that, as well as over all other taxable property in the nation.

Church and abbey lands enjoyed by those who had no spiritual jurisdiction, no substitution for gospel maintenance.

The right of taxation imports the *altum dominum* of property.

If tithes were claimable *jure divino*, the obligation of paying them must be uniformly, universally and indispensably binding upon all christians: for the divine institution of the christian religion is not only universal, or catholic in extending its different effects to all individuals, but in its aptitude to all possible forms of civil government and policy; in so much that it would border on impiety to assert, that state reason and policy could in any instance lawfully and validly supersede the obligations of a divine institution.

General duty of church governors.

It behoves us then to enquire not only, in what this divine institution consists, but in what manner its observance has been enjoined and practised by the church of Christ from the foundation of christianity to the present day: for the office of the church governors, who are the lawful successors of the apostles, is not merely to teach and explain the christian doctrine, as Christ revealed it, but to inspect and inforce by spiritual means the practice of those divine institutions, which he established when upon earth. Now these church governors, more generally called overseers ἐπίσκοποι cannot see to their flocks' performance of their christian duties, unless those duties be defined and ascertained: nor can the flocks conscientiously perform their duties, unless they be clearly and specifically known to be enjoined. In order therefore to fulfil this duty assumed to be enjoined by divine institution, a man must know what portion of his property he must annually or otherwise deprive himself of; whether he should give more of one sort of property than another: to whom he ought to pay or apply it: whether the divine obligation operate upon him differently in different dioceses or countries, and whether he can be validly exempted from it by the *civil* power either wholly or in part: in a word, whether any act of the civil magistrate can subject particular individuals to an obligation of divine institution, which Christ never imposed upon all mankind.

The duties of the governed must be ascertained.

It is allowed by every believing christian, that tithes were due by *divine right* to the priests of the old law: they were defined and ascertained: the times of payment were regulated, and the persons known, to whom they were due. Nor is it to be denied, that many holy fathers, doctors, and divines of prime respectability have holden, that tithes were enjoined as forcibly (even more so) under the new, than they had been under the old law. Yet it must be allowed, that their opinion is supported only by argument of analogy and expediency: for there occurs not in the New Testament one single instance of any mention being made of the payment of tithes to the priests of the new law. The authorities however of the *divine right* of tithes are such, as ought not to be passed over slightingly, much less contemptuously.

The payment of tithes amongst the Jews specifically ascertained.

St. Jerome says, "That which we have said of tithes and first "fruits given by the people of old to the priests and levites, "do you understand also of christian people, to whom it is com- "manded not only to give tithes and first fruits, but to sell all "and give it to the poor, and follow their Lord and Saviour. "Which if we will not do, at least let us imitate the beginnings

Grave opinions for the divine right of tithes.

St. Jerome. " of the Jews, giving to the poor a part of the whole, and pay-
" ing due honour to the priests and levites; and he that doth not
St. Augustin. " this, manifestly cheats and deceives God *." St. Augustin, says, " Tithes are required as a debt, and he that will not " give them invades another's right, though you be not husband-" men and have no fruits of the earth, whatever trade you live " by, it is of God, who requires tithe of whatever is your livell-" hood, whether war, merchandise, or some handicraft trade, " &c." It was holden by the council of Hispalis, " That rich
Council of Hispalis. " and poor do rightly offer all the first fruits and tithes as well of " cattle as of first fruits unto their churches: for the Lord saith " by the prophet, 'Bring ye all the tithes unto the store house,' " (Mal. iii.) Let every husbandman and artificer justly tithe the " profit of his labour: for as God gave all, so he requires tithes " of all: of the fruits of the field, of all food, of bees honey, " lambs fleeces, cheeses, swines, goats, cows, and horses both " great and small; and if any tithe not these, he robs God and " is a thief; yea the curses of Cain are laid up for him, that doth " not rightly divide †."

Mr. Selden ‡ denies the authenticity of this canon of the council of Hispalis; but, be it genuine or spurious, the old collectors and compilers of these ancient canons, *Garcius*, *Birmius*, *Ivo*, *Burchard*, &c. prove the belief of the substance of it to have been very early in the christian church.

Comber. A very staunch advocate for the *divine right* of tithes, says, § " Selden wishes not to suppress the fact of the prevalence of the " earlyconviction of the divine right of paying or applying some por-" tion of one's property to the maintenance of the ministers of the " gospel; though he hold no specific portion was fixed or deter-
Selden contra. " mined by the law of Christ ‖." " But among the known and " certain monuments of truth, till about the end of this four hun-" dred years, no law pontifical or synodal (saving that of *Mascon*) " determines or commands any thing concerning tenths: although ve-" ry many are, which speaking purposely and largely of church reve-" nues, oblations, and such like could not have been silent of them, " if that quantity had then been established for a certain duty." 'This council of *Mascon*, which was holden about the year 586.' (Con.
Council of Mascon. 2. Matiscon, can. 5), says, " The divine laws taking care of the priests and ministers of the church for their hereditary portion,

* In Mal. iii. tom. 5. 641. † Aug. de Temp. Serm. ccxix. tom. xx. p. 235.
‡ Selden's Hist. of Tithes, p. 61. § Comber on Tithes, p. 94. 55. ‖ Hist. of Tithes, p. 62.

have commanded *(præceperunt)* all the people to pay the tithes tenths, *(decimas,)* of their fruits to holy places, that being hindered by no labour through illegitimate things, they may duly attend to their spiritual ministry; which laws the whole society of christians have for a long time kept inviolable; wherefore we decree, that the whole people bring in their ecclesiastical tithes, which the priests applying for the use of the poor or redemption of captives, may by their prayers obtain peace and safety for the people:" and as it is *apud Binnium*, (tom. ii. par. 2. p. 269.) "If any be contumacious to this our wholesome order, he shall be for ever excommunicated."

St. Ambrose. St. Ambrose speaks, if possible, still more explicitly: "What is it to pay tithes faithfully, but that you never offer the worst nor the least to God, either of your corn, wine, fruit trees, cattle, as your garden, your merchandize and your hunting. Of all the substance, which God hath given a man he hath reserved a tenth part to himself: therefore it is not lawful to retain that, which God hath reserved for himself*." St. Chrysostom's words shall close my quotations from the fathers' opinions upon the *divine right* of tithes: "When the artificer sells any thing of his art, let him pay a first fruit of honorary acknowledgement out of it unto God; let him cast a small part to him, for I require no great matter, but so much as the Jews (who were infants in religion, and loaden with many sins) paid; let us that expect heaven do as much. I speak not this as making a law, or forbidding to give more; but requiring that less than a tenth be not consecrated; and not the seller only, but the buyer must do this. This rule they also must observe in their profits, who are possessors of fields; this must be observed by all, that gather any just increase †."

St. Chrysostom.

What judgment to be formed on the authorities of the fathers. These authorities of the fathers for the divine institution and right of tithes are more pointedly confirmed by councils, decretals, and canons: "*Illæ quippè decimæ solvendæ sunt, quæ debentur ex lege divinâ, vel loci consuetudine approbatæ* ‡." Those tithes are necessarily to be paid, which are due either by the divine law or approved custom of the place §. God commands them (tithes) to be paid in token of his universal dominion ‖ they are due by divine constitution and divine command ¶."

* Amb. Serm. xxxiii. Ser. 11. post Dom. 1 quad. † Chrysostom, tom. v. p. 45. Hom. xviii. in Ep. 1 ad. Cor. c. xvi. p. 534. ‡ Conc. Lat. can. 53. apud Bin. tom. iii. par. ii. p. 692. § Ind. Decret. 1. 3. tit. 30. c. xxvi. p. 1341. ‖ Ibid. c. xxv. p. 1339. ¶ Ibid. c. xxvi. p. 1342.

I could by multiplying such quotations, fill a volume: let those suffice to shew the grounds, upon which this opinion of the *divine right* of tithes rests: and truly, if we submit our understandiug to the mere literal sense and import of the words of those fathers, councils, and decretals without examining into the force of their authority, the opinions of others, and the actual laws and usages of the church, we shall be scarcely warranted in questioning the *divine right and institution of tithes* in the new law.

How the gospel ordidance operates upon christians.

I have before fully and explicitly expressed the manner, in which (I humbly conceive and submit to the better judgment of others) the divine ordinance for maintaining the ministers of the gospel operates upon christians; but this ordinance which, if contained in the gospel, must necessarily be of *divine* institution will have operated upon all members of the church, from the establishment of christianity, and must continue to operate to the end of time throughout all Christendom, uniformly, unexceptionably, and indispensably. Far be from me a wish to put a check upon the zeal and devotion of pious contributors to the revenues of the church. I am fully confident, that their sacrifices were grateful to God, and upon the whole, the property thus applied became more generally beneficial to the poor and needy, than when retained and managed by private individuals.

Nature of church donations.

Every donation to a laudable, pious, or charitable use will find its reward from a just God, who sees the purity of the donor's heart: but as it is only by the permission of the state, that such appropriations of property can be made, so it is out of the power of the state to divest itself of that supreme or *altum dominium*, by which it permitted the gift, and must continue to superintend and controul the property in the same manner it ever did, in whosesoever hands it may be vested.

The *altum dominium* of property is in the state.

The abuse of a power is no argument against the right to the possession of it: it is of the last consequence in this enquiry to ascertain, where the supreme right of disposing of property exists, for even the sinful exercise of that right by the *civil* magistrate may in some instances create a conscientious obligation or duty in individuals, which they ought necessarily to know, in order that they may comply with it. According to Mr. Burke, "They have identified the estate of the church with the mass of "private property, of which the state is not the proprietor, either "for use or dominion, but the guardian only and the regulator." To form a right opinion or judgment of this church fund we must according to him view it in the same light precisely as the private

property of individuals: but the supreme and *altum dominium* of all private property is evidently in the state.

The right of taxation is the criterion of the *altum dominium*.

"To mortgage," says he, "the public revenue implies the sove-"reign dominion in the fullest sense over the public purse, it goes "far beyond the trust even of a temporary and occasional taxa-"tion*." Now no Englishman will deny the right of parliament to raise whatever money they think proper either by *temporary* and *occasional taxation* or by *mortgage of the public revenue*. Church land being a part of the mass of private property is liable to be charged with any public loan. Every mortgage or loan is an absolute deprivation of the property to the extent of the loan. If in raising thirty millions for the expences of the current year, the property of the archbishop of Canterbury should be charged with taxes to the amount of 100*l*. per annum towards payment of the interest of that loan, it is to all intents and purposes a diminution of his annual income by that sum; and is an actual deprivation and appropriation of it to another purpose than that, to which it was before applicable. This is effected without the necessity of any actual consent of the party deprived; which evidently cannot be performed, but by that power, which possesses the supreme right of disposing of the property so disannexed and appropriated. The act of thus depriving the archbishop of Canterbury, as well as all other beneficed clergymen proportionably of a part of their income or property produces an effect, by which alone we must judge of the nature of the efficient cause: the effect I allude to is the conscientious obligation, which after this act of the state falls upon every individual of applying the property to the purposes directed by the state, and which consequently obliges the deprived person to comply with and submit to the very act of deprivation. This effect can only be produced by a power lawfully and validly constituted and enabled thereto. In England the king without the consent of the lords and commons could not induce this effect upon an individual: nor whilst this country was in communion with the see of Rome, could the pope have imposed any such obligation: neither could any foreign power or state have effected it; for no conscientious obligation or duty could arise from their attempt to impose such duty or obligation. Whenever then under such an act of supreme power the conscience becomes affected by the non-compliance with its injunctions, it is conclusive, that the power, which directed the act, had a

* Reflections on the French Revolution, p. 152.

right to make the disposal, for otherwise the property affected would not have suffered a change or transfer; and the consciences of those, who should retain or purloin or divert this property from the purposes intended by the state could not be affected by any detention, deprivation, or misapplication of it unless the transfer had been real and binding.

Difference between *natural* and *positive* laws or precepts.

That the payment of tithes in the old law was of *divine* institution, no man can doubt who believes the books of Moses; but in believing this, he also believes that the Jewish theocracy was both a *temporal* and a *spiritual* establishment. The kingdom of Christ is neither temporal in its origin, means, or end; it is purely *spiritual:* it was founded by the supernatural power of a God-Man. The jurisdiction, order, and power of its governors were first given immediately by God to his apostles, and are claimed by their successors only as perpetuated by the means of *spiritual* generation. In order to ascertain what is of divine institution, precept, or law, we must first attend to the difference between *natural* and *positive* law, or precept. The law of nature, or the natural precept is, properly speaking, the dictate or judgment of human reason, which by means of the light infused into us by the author of our being, directs us to do good and avoid evil. From this general law of nature, or *natural* precept, are derived the particular precepts or commands, which have obliged all mankind unexceptionably from their creation, and will continue to bind them till the end of time. Such are, that God is to be worshipped: that we are to injure no one; and all the ten commandments (except the particular observance of the sabbath.) *Positive* laws or precepts are enjoined by, and depend upon, the free will of God or man: as for example, christian baptism is a *positive* precept of *God:* the fast of Lent is a *positive* precept of *man.* A positive precept then is either of *divine* right, as delivered or enjoined immediately by God; or only of *human* right, which is enacted by man: this may be either *ecclesiastical* or *civil.* The *divine* precepts or injunctions are divided into those of the old and those of the new law. Those of the old law consisted of *moral, ceremonial,* and *judicial* precepts: those of the new comprise the supernatural precepts of revealed faith, and the sacraments of the christian church.

No positive precept in the new law to pay one-tenth to the church.

I have given into this sort of pleonasm, merely to prevent, if possible, my obvious meaning from being distorted or misrepresented. The thesis I therefore submit, (under correction,) to the general judgment of all christian divines, is, that in the new law there is no positive *divine precept or law* for the payment of the

specific tenth part of our property, or tithes, to the church. An assertion of this nature, in apparent opposition to the great authorities, that have been, and of many more that might have been quoted, requires undoubtedly something more to support it, than the arguments and reasons of a private individual.

Bold or blasphemous must be the man, who admits that God has imposed a positive injunction, precept, or law upon his creatures, from which any of them can be exempted by themselves or their fellow-creatures, without a special power from the God, who imposed it. The wish and intention of complying with every conscientious obligation (such certainly is a precept of *divine* institution) is not confined merely to these *divine tithing men*: they however by admitting of the divine injunction assume evidently an indispensable obligation and duty of complying with it. Nor can this conviction exist in any man without subjecting him to the conscientious obligation of squaring his practice to his belief: and this will induce a serious and very important examination into the expenditure and application of his property; for in such case of divine perpetual tax upon income, the detention or misapplication of one shilling beyond the nine parts of the net income from the particular church governor, to whom he owes spiritual submission, or from the minister, whose duty it is to administer the gospel to him would be a fraud, disobedience, and offence against God, as well as an act of injustice to man.

Aquinas says*, "that tithes now no longer oblige, but according to (or in virtue of) the usage (or common law) of each country and the indigence of the ministers of the gospel: *nunc non amplius obligant, nisi secundum consuetudinem patriæ et indigentiam ministrorum ecclesiæ.*" No man, who understands the first rudiments of human policy or legislation will deny, that each community may lawfully change and alter their laws and customs. Whatever these laws therefore enjoin, each resident subject of the state is bounden and obliged by the general ordinance of God's providence to obey and comply with. And if the state do not by a settlement of tithes, or some other provision for the ministers of the gospel prevent the operation of the positive divine precept, "*quæ non obligat, nisi secundum indigentiam ministrorum,*" then it leaves it to the faithful to provide amongst themselves for the decent and proper maintenance and support of their bishop, and the particular clergyman, whom he may institute their minister, according to the evangelical ordinance.

Tithes now due only according to law and the wants of the minister.

* 2. p. 9. Q. 86. 2. 4.

That which binds by virtue of a municipal law is necessarily subject to the controul of the power, which can alter or repeal the municipal law. This only is the *civil magistrate*, who alone can affect *consuetudinem patriæ*, and according to or by virtue of that alone does the payment of tithes oblige.

Church governors are not human legislators.

No *divine tithing-man*, that I have met with, has ever pretended to assert, that God has granted to the governors of the church any power over the *consuetudines patriæ* or the common or municipal law of the land. They are not *human* legislators, by virtue of their *spiritual* charter or commission. Upon this principle the learned Selden said, "* The common laws of all nations "(where feudal laws are, and I think certainly in all christian "nations feudal tithes at this day are found) allow them now, "and suffer the canons to have no power over them: † with "Cajetan also, continues Selden, in that the law for tithes is "not moral, *Bellarmine*, *Suarez*, *Malder*, *Bishop of Antwerp*, and "late professor of Louvain, and others accord, and make it the "*communis opinio theologorum*.

The continued usage of the church against the payment of one-tenth.

I will not assert, that the neglect to observe a divine precept is evidence of its not being obligatory and compulsive: but if we reflect, that for near 1800 years, in every variety of climate, habit, disposition, policy, and government, a numerous body of the clergy in every country has foregone the advantage of a full tenth of the property of their flocks for want of enforcing the *divine precept*, which for argument sake I will suppose, has been taught by most divines of the christian church, we must conclude, that what was not insisted upon by the church governors, nor actually paid by the governed for such a series of time, could not have been in fact really enjoined and commanded by a *divine positive precept*. For I again say, that every positive divine precept, or injunction, is indispensably and unexceptionably obligatory upon all mankind. Can one solitary instance be alledged, since England has been christian, in which the obligation of tithing has been observed to the extent, to which these *divine tithing-men* have carried it?

Exemplified by the London diocess.

One tenth of all the payments and receipts for merchandise and goods, and lands bought and sold within one year in the London diocess, upon the return of all land and its fruits and rents, and of all stocks, funds, and monies carrying interest, and of all that man possesses, would certainly amount to millions. And if the parson be entitled *jure divino* to such tithes, the parishioner is indispensably

* History of Tithes, p. 155. † Ibid, p. 160.

bounden to pay them: *nemo excusatur.* The civil magistrate can no more dispense with the divine precept, than an individual can resist it. No custom or prescription can be set up to evade or weaken a divine precept, by privilege, commutation, or otherwise.

BOOK I.—CHAP. III.

Tithes, and other Ecclesiastical Revenues and Immunities, considered historically.

The spiritual power commands not the means of external coercion.

IT has been attempted to be proved, that property is essentially the creature of the *civil* power, and therefore out of the competency of the *spiritual* power. The former only possesses the compulsory means of external coercion. The latter can only bind the conscience. It follows, consequently, that security for the permanent payment of tithes can only be expected or ensured by resorting to that power, which possesses the means of coercion. Wherever, as in *England*, the *civil magistrate*, or supreme legislative power, has taken upon itself to institute and enforce a commutation or substitution for the christian obligation of contributing to the maintenance of the gospel minister, there has the *civil magistrate* wisely consulted the mutual benefit of the ministers or church governors, and the flocks, or governed, by arming the former with human external and coercive means of procuring a fixed maintenance, which the divine institution, precept, or injunction, did not supply them with, and by easing the latter of the conscientious duty of raising contributions for their ministers, which being unascertained in quantity, must necessarily be vexatious, invidious, and unequal, in proportion as depravity of morals may produce unreasonableness in the minister, or inattention in the flock to the internal dictates or obligations of conscience*.

* It would be an endless as well as useless task to examine, discuss, and refute the multifarious and singular arguments, used by several of the most respectable advocates for the *jure divino* title to tithes. I go as far as any of them in admitting, that man is in gratitude and duty bounden to acknowledge all the gifts and enjoyments of nature as from the beneficent hand of an all-bounteous Deity: that the priests of God's altar, when unprovided for, that the poor and helpless at all times, have a call of justice upon the opulent for a considerable share of their worldly substance; and that the rich man is accountable to his Maker, (not to the *civil magistrate*) for the prudent and benevolent appropriation of his property. Yet can I not annex any such mysterious or cabalistic

Payment of tithes before the law.

Doctor *Comber* gives this historical sketch of the payment of tithes before the law, and infers from it, that before and since the

quality to the number *ten*, as with the respectable *Hooker*, to draw from that number an argument for appropriating that particular proportion of one's property to the maintenance of the gospel minister. (*Hooker, Ecc. Pol.* 427.) "As *Abraham* gave voluntarily, as *Jacob* vowed to give God tithes, so the law of *Moyses* did require at the hands of all men the selfe same kind of tribute, the tenth of their corne, wine, oile, fruit, cattle, and whatsoever increase his heavenly Providence should send. In so much that Paynims, being herein followers of their steps, paid tithes likewise: imagine wee, that this was for no cause done, or that there was no speciall inducements to judge the tenth of our worldly profits the most convenient for God's portion? Are not all things created by him in such sort, that the formes, which give them distinction, are number, their operations measure, and their matter weight. *Three* being the mystical number of God's unsearchable perfection within himself: *seaven*, the number whereby our owne perfections through grace are most ordered; and *ten*, the number of nature's perfections, (for the beauty of nature is order, and the foundation of order number, and of number *ten*, the highest wee can rise unto without iteration of numbers under it.) Could Nature better acknowledge the power of the God of Nature, than by assigning unto him that quantitie, which is the continent of all shee possesseth. There are in *Philo*, the *Jew*, many arguments to show the great congruitie, and fitnesse of this number in things consecrated unto God." The like doctrine is strongly urged throughout the first chapter of Doctor *Comber's Historical Vindication of the divine Right of Tithes*. Sir Henry Spelman, in his *larger Treatise concerning Tithes*, p. 127. is not satisfied with proving (according to his idea) that the divine precept of appropriating this specific portion or tenth part of our worldly substance in the payment of tithes from the example of the *Patriarchs*, *Pagans*, *Jews*, *Turks*, and *Infidels*, but also from the instinct of the very beasts of the forest. "*Œlian* relateth, (as Mr. *Selden* cireth him,) that some kinde of beasts in Africa, alwayes divided their spoile into eleven parts, but would eat onely the tenne, leaving the eleventh as a kinde of first fruits or tithe; and why may not beasts of the field teach men the practice of piety? seeing man, that is without understanding, is compared to them."

"Thus *Jews*, *Pagans*, *Turks*, and some beasts have had a care to pay tithes, but many christians in these days come farre short in their duties, and may be upbraided with these examples." I shall close these observations with Sir *Henry Spelman's* very curious Abstract of the *divine* Title to Tithes, p. 93. "We have said in our definition, that they be due unto God. Now we are to shew by what right, and to prove it. First, therefore, I divide tithes into two sorts, moral and levitical; moral are those, which were due to God before the law given in the time of Nature. Levitical, are those nine parts assigned by God himself, (upon giving the Law) unto the *Levites* for their maintenance, the tenth part being still reserved to himself, and retained in his own hands. Moral tithes were paid by man unto God, *absque præcepto*, without any commandment; Levitical tithes were paid by the Israelites unto the Levites, as transacted and set over by God unto them, *pro tempore*, for the time being, and that by an express canon of the ceremonial law. To speak in the phrase of lawyers, and to make a case of it; God is originally seised of tithes to his own use, *in dominio suo*, *ut de feodo*, in his own demesne, as of fee simple, or as I may say, *jure coronæ*, and being so seised by his charter dated —— year after the flood, he granted them over to the *Levites*, and the issue male of their bodies lawfully begotten, to hold of himself in *frank-Almoigne*, by the service of his altar and tabernacle, rendering yearly unto him the tenth part thereof: so that the *Levites* are merely tenants in tail, the reversion expectant to the donor, and consequently their issue failing, and the consideration

divine legation to *Moses*, tithes were due *jure divino* to all priests according to the order of *Melchisedec*. Of the practice of tithing, "there are two famous instances in scripture during this period: "the first is *Genes.* xiv. where *Abraham* returning from his victory "over the four kings, was met at *Shaveh*, or the *King's-dale*, by "*Melchisedec* king of *Salem* who *brought forth bread and wine, and* "*he was the priest of the most high God: and he blessed him and* "*said blessed be Abraham of the most high God. Possessor of heaven* "*and earth, and blessed be the most high God, which hath delivered* "*thine enemies into thine hand, and he gave him tithes of all* *, "ver. 18, 19, 20, and to shew this related to Gospel times *St.* "*Paul* largely paraphrases this history, and applies it to our "Saviour's priesthood, Hebr. vii. &c. and whereas we read not "of any ceremonial worship that he performed, it is plain his "office consisted in those eternal and evangelical duties of praying "for his people and praising God, to which we may add his "bringing out bread and wine, which the fathers make the type "of the great gospel sacrament, and therefore the ancients doubted "not to affirm, that the gospel ministers were of the same order "with *Melchisedec* †. They have the same work to do, and de- "serve the same reward, viz. tithes, which we see are not (as "some ignorant persons fancy) appropriate, were paid to a cere- "monial priesthood, but were paid to *Melchisedec*, whom *St. Paul* "makes to be of a quite different order from that of the *Levitical* "priesthood, whose pedigree was to be proved and their descent "to be on record; but *Melchisedec's* genealogy is not written, his "tribe is not recorded, nor his family or successor mentioned, yet "he had tithes, whose priesthood was no more tied to any one "tribe, than ours is under the gospel; and as we derive our "priesthood from this order, so we may also prove our right to "tithes from the payment of them unto the first priest of this or-

Evangelical priesthood according to the order of Melchisedec.

"and services being extinct and determined, the thing granted is to revert to the donor, "and then is God seized again, as in his first estate, of all the ten parts in fee.

"But we must prove the parts of the case: and first, the title; namely, that he "was seised in fee of original tithes, that is, that original tithes doe for ever belong unto "him. Hear the evidence, which I will divide into three parts, as grounding it first "upon the Law of Nature; secondly, upon the Law of God; and thirdly, upon the "Law of Nations."

* The learned *Selden*, p. 2. says, that this has generally been understood of all the substance or all the spoils he had by that expedition, and that Josephus, taking up the prevailing understanding of his day among the *Jews*, says, it was the tithe of what was gotten by the war.

† Hieron. qu. in Gen. tom. iii. p. 328. Epiphan. contr. Hæres. 55. l. 2. tom. i. p. 209. Steph. 171. Isidor. Hispal. Glos. in Genes.

" der: it is true, he was also a type of Christ, and (though not " Christ himself, as some fancy, yet) so like him, that the fathers " expound *Abraham's* having seen *Christ's* day, *John*, viii. 56. " of this his meeting with his type *Melchisedec*: but his being a " type of *Christ's* priesthood, (in all points but that of offering " a bloody sacrifice) doth not hinder him from being a type of " the evangelical priesthood also, which is in all things (except " his offering himself on the cross) the same with *Christ's* priest- " hood, as he declares in his commission to those apostles, (whose " successors ordained us.) *As my Father sent me, even so I send* " *you*; wherefore we conclude, that the first receiver of *Tithes* " upon record, was a priest, not of the same order with *Levi*, " but of the same order with the evangelical priesthood, and since " they do the same duties, they have a good title to the same " reward."

Tithes payable under the Levitical law.

Docter Potter * gives the following succinct historical account of the tithes ordained to be paid under the law of Moses, which amply answers all the purposes of this publication without entering into the minute and diffuse disquisition of the different payments made by the *Jews* so pertinaciously contested by *Spelman*, *Comber*, *Scaliger*, *Selden*, and others, who entered the tithe lists of those days. " Among the *Jews* the *priests* had the first fruits of " cattle, corn, wine, oil, and other fruits of the earth, which the " Jews *dedicated* every year to God; and the price, which was " paid for the redemption of their first born children: they had " the voluntary oblations, which the people vow'd to God, and " those, which they offer'd without any precedent vow, and the " remainder of things offered in sacrifice. The *Levites* had the " *tenths* of all things, and the high priest had the *tenth* of their " *tenths*; and both these *tenths* were to be of the best in their " several kinds †: and beside this, they had forty-eight cities, with " the adjoining territories of land, to hold as their free and perpetual " inheritance ‡: so that the *Levites*, who were one of the least of " all the twelve tribes, as appears from the computation in the " times of *Moses* and of *David* §, may reasonably be supposed to " have had almost four twelfth parts of the product of the coun- " try; so that their estate was at least four times as good, as " that of any other tribe. And if the *Levites* were commonly

* A discourse concerning church government, by Doctor *Potter*, chaplain to her majesty, and to his grace the Archbishop of *Canterbury*, 1707, p. 428.

† Numb. xviii. Lev. xxvii. ‡ Numb. xxxv. 7. Josh. xiv. 4.

§ Numb. iii. 14. xxvi. 62. 1 Chron. xxiii. 2.

" between thirty and forty thousand, which is the utmost we " can suppose them to have been, from the before mentioned " accounts; then the proportion allotted to the *high priest* was " equal to what three or four thousand Levites lived upon."

This same learned divine immediately adds " we do not pre- " tend that the law of *Moses* does oblige *christians* and therefore " shall not affirm, that *christians* are obliged to pay the minis- " ters of the gospel their *maintenance* in the same manner, wherein " the *Jews* maintained their *priests* and *Levites*." Dr. Potter further concludes with an admission, which appears to contradict the opinions of most of the advocates for the divine right of tithes. " It remains only to be enquired, whether the dedication of " *tenths* was confirmed by our *Lord* or his apostles? And it must " be owned, that though they have fully asserted the *clergy's* right " to maintenance, and the necessity of dedicating some part of " our substance to God in general, they are wholly silent as to " the proportion of *tenths*. For this several reasons may be " given: as *first* that the *Jewish* priests were then in possession " of the *tithes*, and it would undoubtedly have raised great commo- " tions and very much hindered the progress of the gospel, if the " christian ministers had claimed that, which others had a legal " title to. *Secondly*, their practice would have seemed inconsistent " with their doctrine, if they had settled a constant *maintenance* " for themselves, whilst they persuaded others to sell their estates " for the service of the church and the poor. *Lastly*, in that age " the devotion of *christians* was generally so great, that they very " much exceeded the proportion of tithes, in their contributions " to the church. Many of them sold their whole estates, and gave " the price to the apostles*." A conclusion which, it is submitted, precisely leaves the divine precept or injunction to maintain the gospel ministers in the conscience of the faithful, according to the eventual indigence or want of the particular ministers. It may be here remarked, that the ministers' *jure divino* title to receive must import the conscientious and indispensable obligation of the parishioner to pay. And although the commutation or substitution for tithes made by the *civil magistrate* deprive the minister of the right, whilst it lasts, of exacting tithes of his parishioners, and consequently releases the parishioner from the obligation of paying them, even if demanded; yet far be it from me to suggest, that such substitution or commutation, which is evidently calculated for the peace benefit and promotion of christian virtue, should operate as an

The christian priesthood maintained differently from the Levites.

* Acts, ii. 44, 45. iv. 34, 35.

encouragement, much less as a justification to the opulent individual for curtailing his charity and benevolence to the distressed and needy. The divine precept or injunction of a gospel maintenance ever follows the spiritual jurisdiction of the particular minister: the christian obligation of charity and benevolence knows no stint but the prudence or pre-existing obligations, of the possessor of the means to relieve distress.

Dr. Potter appears to have brought together, with more accuracy than any other writer upon the subject, whatever is to be collected from the New Testament, as enjoining tithes or a gospel maintenance.

Tithes under the law of the gospel:

" * First of all our *Lord* himself, with his retinue of *apostles* and " *disciples*, was *maintained* by charitable contributions. Though " he was born *king of the Jews*, he had no temporal possessions, " not so much as *where to lay his head* †; yet he was furnished " with money, out of which he not only provided necessaries for " himself, but also us'd to be liberal to the poor. This is mani- " festly implyed in that which is told of *Judas Iscariot*; that " when Mary poured forth a box of very costly ointment upon our " *Lord's* head, he broke out into these words: *why was not this* " *ointment sold for three hundred pence, and given to the poor? This* " *he said, not because he car'd for the poor, but because he was a* " *thief, and had the bag, and bore what was put therein* ‡. Again, " when our *Lord* said to him at his last *Paschal* supper, *that thou* " *dost, do quickly*; meaning, what he had contracted with the " chief priests to do; *some* of the apostles *thought, because Ju-* " *das had the bag, that Jesus had said unto him, buy those things* " which we have need of against the feast, or that he should give " something to the poor §. Whence it is manifest, that our " *Lord* had a stock of money, which *Judas* had the care of ex- " pending, for the relief of the poor, and other necessary uses, as " our *Lord* directed. Whence this stock us'd to arise, may be " learnt from the forementioned words of *Judas*, wherein he express- " ed his desire to have *Mary's* ointment sold, and the *price* delivered " to him as our *Lord's* steward; which implies, that it was his of- " fice to receive the contributions of well disposed persons, for " our *Lord's* use; and, consequently, that his stock was made up " this way. The same is directly affirmed by St. *Matthew*: *ma-* " *ny women*, says he, *were there, beholding afar off, which fol-* " *lowed Jesus from Galilee, ministering unto him. Among which*

* *Potter*, 416. † Math. viii. 20. Luke ix. 58. ‡ John xii. 5, 6. § John xiii. 27, 28.

" was *Mary Magdalen, and Mary the mother of James and Joses,*
" *and the mother of Zebedee's children* *. For the ministering,
" here spoken of, was that of their worldly substance, as it is ex-
" plain'd by St. *Luke: there went about,* saith he, *with Jesus,*
" *certain women, which had been heal'd of evil spirits, and infir-*
" *mities, Mary called Magdalen, out of whom went seven devils;*
" *and Joanna the wife of Chuza, Herod's steward, and Susanna, and*
" *many others, which ministered unto him of their substance* †.
" Whence it is manifest, that our *Lord* and his company were sup-
" ported by the pious contributions of his followers. When
" he first sent forth his *apostles* to preach, he gave them this instruc-
" tion: *Provide neither gold, nor silver, nor brass in your purses:*
" *nor scrip for your journey, neither two coats, neither shoes, nor*
" *yet staves; for the workman is worthy of his meat* ‡. To the
" same purpose he speaks to the seventy disciples: carry neither
" purse, nor scrip: and into whatsoever house ye enter, in the
" same remain, eating and drinking such things as they give
" you, *for the labourer is worthy of his hire* §. Whence it is ma-
" nifest that our *Lord* accounted it the duty of those, to whom
" the gospel was preached, to give a competent maintenance to
" those, who preached it: and how the *disciples* succeeded, we
" may learn from the same gospel, where our Lord having asked
" them, when I sent you *without purse* and scrip, and shoes, lacked
" you any thing? they said, nothing ‖."

" The apostles and the rest of the gospel ministers, were sup-
" ported the same way, after our *Lord's* ascension. For we find,
" that the first *christians sold their estates,* and *laid* the price of
" them at the *apostles feet,* to be disposed of by them, as the neces-
" sities of the church required ¶. St. *Paul* received large con-
" tributions from the *Philippeans,* whom he had converted: *Now*
" *ye, Philippeans,* says he to them, *know also, that in the begin-*
" *ning of the gospel, when I departed from Macedonia, no church*
" *communicated with me, as concerning giving and receiving but*
" *ye only. For even in Thessalonica ye sent once and again to my*
" *necessity. Not because I desire a gift: but I desire fruit, which*
" *may abound to your account. But I have all, and abound, I am*
" *full, having received of Epaphroditus the things, which were*
" *sent from you, an odour of a sweet smell, a sacrifice acceptable,*
" *well pleasing to God. But my God shall supply all your need, ac-*

* Math. xxvii. 55, 56. † Luke viii. 2, 3. ‡ Math. x. 9, 10.
§ Luke x. 5. ‖ Luke xxii. 35. ¶ Acts iv. 37.

" *cording to his riches in glory by Christ Jesus* *. Where the " *apostle* assures them, that the liberal supply they had sent him " was accepted by God, as an oblation to himself, and that he " would abundantly recompense it. Indeed he owns, that *in the* " *beginning of the gospel;* that is, when he first preached in the " country thereabouts, other churches had made no collections for " him: and he puts the Thessalonians in mind, that he had " maintained himself by his own labour, whilst he lived among " them: neither did we eat any man's bread for nought, says he, " but wrought with labour and travel night and day, that we " might not be chargeable to any of you †. But at the same " time he asserts his right to require *maintenance* of them, " which he forebore to exercsie, lest he should give offence, and " to shew them an example of industry and frugality: as it fol- " lows in the next words: 'not because we have not power, but " to make ourselves an ensample unto you to follow us. For " even when we were with you, this we commanded you, that " if any would not work, neither should he eat. For we hear, " that there are some, which walk among you disorderly, work- " ing not at all, but are busy-bodies ‡. ' The same *apostle* re- " fused to accept *maintenance* of the *Corinthians*, to silence some " false *apostles*, who preached without receiving any thing from " them, in order to insinuate themselves the better into their good " opinion; but then he very fully declares and proves his right to " it: *or I only*, says he, *and Barnabas, have not we power to for-* " *bear working? Who goeth a warfare any time at his own char-* " *ges? Who planteth a vineyard and eateth not the fruit thereof?* " *Or who feedeth a flock and eateth not of the milk of the flock? Say* " *I these things, as a man, or saith not the law the same also? For* " *it is written in the law of Moses, thou shall not muzzle the mouth* " *of the ox, that treadeth out the corn. Doth God take care for oxen,* " *or saith he it altogether for our sakes? For our sakes, no doubt* " *this is written; that he that ploweth, should plow in hope; and that* " *he that thresheth in hope, should be partaker of his hope. If we* " *have sown unto you spiritual things, is it a great matter, if we* " *reap your carnal things? If others be partakers of this power* " *over you, are not we rather? Nevertheless we have not used this* " *power; but suffer all things, lest we should hinder the gospel of* " *Christ. Do ye not know that they, who minister about holy things,* " *live of the things of the temple; and they who wait at the altar,* " *are partakers with the altar? Even so hath the Lord ordained*

* Philip. iv. 16, 17, 18, 19. † 2 Thes. iii. 8. ‡ Ver. 9, 10, 11.

" *that they, who preach the gospel, should live of the gospel. But* " *I have used none of these things* *. In which words we may ob- " serve: *First*, that all the *apostles*, except *Paul* and *Barnabas*, " *forbore working*, and consequently were *maintained* by the church. " *Secondly*, that though these two sometimes refused to accept " *maintenance*, they had a right to it. *Thirdly*, that the *apostle* " proves this right, 1st, from the law of nature and reason, which " requires, that every man should have a reward for his labour; " and this, he shews from the examples of soldiers, husbandmen, " and others. 2dly, from the law and practice of the *Jews*, " among whom all labourers in general, and in particular " those, who waited at God's altar, were maintained by their la- " bour and service. 3rdly, from our *Lord's* express institution, " who requires, that the preachers of the gospel, *should live of* " *the gospel*; as was before shewn from his instructions to his " *apostles* and *disciples*, when he sent them forth to preach."

Maintenance of the minister not eleemosynary.

A great part of what is here said, evidently bears upon charitable donations and appropriations to the poor: which is an object different from that of the maintenance of a priesthood. Nothing whatever occurs to distinguish between different sorts of property, so as to fix the landholder with the payment of tithes, from which the monied man should be exempt. So much the reverse, that the only mention made of lands, is, that the faithful usually sold them, and threw the purchase money at the apostle's feet, or into a stock purse, which was common to all the members of their nascent, (though then very numerous) society or assemblage. *Tertullian*, who lived about 200 years after *Christ*, has left a very strong, though not highly finished etching of the christians of his day, representing them as a brotherhood, of one heart and one mind, participating in common of every blessing of life, excepting their wives †. *Ex substantiâ familiari fratres sumus. Itaque qui animus, animâque miscemur, nihil de rei communicatione dubitamus. Omnia indiscreta sunt apud nos, præter Uxores.*

All things in common with the primitive christians.

They could not pay any specific portion to the minister.

Under this system no individual could be called upon to pay a *tenth*, or any other particular gospel maintenance, to his minister, as is evident: nor indeed to give alms to the poor (at least *christian* poor;) for if all the property belonging to the christian brotherhood, were in common, there could be no poor amongst them. But very soon after this time, either from the encrease of numbers, or decrease of fervor, the spirit of this voluntary poverty began to

* 1 Cor. ix. 6—15. † Apolog. cxxxix.

evaporate, and we find St. *Cyprian*, *Tertullian*'s scholar, complaining in his day, that though the first *christians* sold their houses and lands in order to lay up treasure for themselves in heaven, and offered the price to the *apostles*, to be distributed *amongst the poor*, yet then they did not even pay tithes of their estates; though the Lord commanded them to sell, they rather bought and encreased. *At nunc de patrimonio, nec decimas damus; et cum vendere jubeat Dominus, emimus potius et augemus* *. Surely this holy father's zeal was rather on the stretch, when he says, *vendere jubeat Dominus*: we read of the council (not a precept) given to the young man in the gospel, of selling all and giving to the poor, if he chose to be perfect. But it is evident, that the following of that advice, would have utterly disabled him from paying tithes to his pastor, as it must also have disabled all those *christians*, who had divested themselves of their property, and thrown it into the common fund. Our blessed Lord did not even suggest, much less command any reserve of a tenth or any other portion of the young man's property, for the minister of the altar. Peculiar attention must be had to the effects and inferences, which flow from the historical facts recorded or alluded to in the New Testament, and the early fathers. It appears incontestible from the *acts of the apostles*, iv. 34. that the sale, or disposition of land, which was then generally made by the believers in *Christ*, was not obligatory, nor the appropriation of the purchase money to the stock purse or common fund, compulsory upon the individual. The history of *Ananias* and *Sapphira* has been constantly resorted to by the advocates of the *jure divino* title to tithes, as if that awful judgment of God had been executed as an example to terrify mankind into the exact payment of tithes according to the divine institution, and to warn them from any sacrilegious invasion, or disappropriation of church property.

Voluntary poverty an evangelical council, not a precept.

Every man, who admits the divine inspiration of the holy scriptures, must be sensible, that the more warmly he espouses a particular opinion, so much more confidently will he construe the sacred text in support of his own *thesis*. It appears, however, difficult to conceive how broad historical facts can thus be forced to direct opposite bearings. The blessed *Jesus* is no where recorded to have had any temporal possession whilst upon earth: not so much as where to lay his head. *Matt.* viii. 20. When called upon to pay the tax or tribute to Cæsar, he performed miracles rather than an act of ownership over any temporal property.

No fixed establishment for the clergy in the primitive church.

* Lib. de Unit. Eccl. p. 85.

When he sent forth his apostles to preach, he warned them to make no temporal provision for their mission, *for the workman is worthy of his meat.* *Matt* x. 9, 10. He gave a like instruction to his disciples, whom he presumed to have no stable or permanent habitation of their own; for he tells them, *into whatsoever house ye enter, in the same remain eating and drinking such things as they give you: for the labourer is worthy of his hire.* It would give a new colouring to the ordinances of the christian gospel, to assert, that they were appropriate to the primitive church, but that future circumstances would render them inapplicable to the church of *Christ* in after ages. Doubtless the ministers of the gospel, in the early progress of christianity were less stationary, than they became after its general adoption. Fixed establishments in houses and lands may have become expedient, or necessary for the latter, which were incompatible with the itinerary labours and gradual progress of the former. On whatever reasons and grounds (they are many cogent and laudable) christian states have thought proper to invest their clergy with a fixed and permanent estate in lands, or the annual produce of lands, it cannot be contended, that they were drawn from the example and precedent of the primitive church, which *historically* appears to have annexed eminent merit to their members voluntarily depriving themselves of the very means of securing any such permanent or fixed establishment. One wonders then to find the zeal of so respectable a writer as Doctor *Comber* enforcing the necessity of supplying the gospel minister, with the means of exercising, certainly a most amiable, but what he rather newly terms an *apostolical* virtue, namely that of *hospitality* *. " The same apostle requires the " clergy should be *given to hospitality* †, which doth require a " certain and a large proportion to support it, and yet the minis- " ters are forbid by scripture ‡, and by the canons of the church " also §, to use any other trade to get money, and are enjoined to " give themselves wholly to their ministry, and to attend conti- " nually upon it ‖, so that they have neither time nor means al- " lowed to procure wherewithal to be hospitable, and yet God " requires they should be *given to hospitality*; whence we may " infer, that he, who lays this injunction on them, hath at " least allowed them the old proportion of a *tenth*, to enable " them to do what he requires of them." The like, says Sir *Henry Spelman* " Paul commandeth that the bishops should be

Clerical hospitality

* Comber, 49. † 1 Tim. iii. 2. ‡ 2 Tim. iv. 4. § Apostol. can. vi. lxxxi, xxxii. Concil. Chalced. can. iii. &c. ‖ 2 Tim. iv. 15.

" φιλοξενα, *hospitales*, good housekeepers, and how should they be " so, if they have not a provision and means to maintain it: and " that in a certain manner. For if themselves be fed ... the " trencher of benevolence, what assurance have they of a dish " of meat for their poor Brethren *." This zealous knight seems to give up however the force of precedent and example, by disapproving of what had existed and ought no longer to exist. " It is merely therefore unfit, that ministers should live on bene- " volence and uncertainty: therefore though *Christ* and the apos- " tles lived so for the present, yet it is not prescribed as a perpe- " tual law to the succeeding minister." The real question is; has God given any precept, has he imposed any obligation upon all christians to provide for and maintain the successors of the apostles in any other manner, than the primitive christians were obliged to provide for and maintain the apostles themselves †.

Civil establishment of religion before the Reformation.

In order to leave nothing upon this important subject in obscurity, or doubt, some historical observations are offered upon the conduct of our British ancestors respecting tithes and other church property, whilst they acknowledged a supremacy in the pope of *Rome*. The *civil establishment*, which the *English* nation before the reformation gave to their religion differed from that *civil establishment*, which it has since allowed, by the single circumstance of their submission to the pope or bishop of *Rome*, as the supreme ordinary of the whole christian church, and by the consequences, which necessarily follow that submission.

Before the reformation a part of the *civil* establishment of religion in *England* was *by the consent of the nation* permitted to be under the controul and power of the bishop of *Rome*, as is evident by the laws of the land allowing of appeals to Rome from the ecclesiastical court of the Archbishop of Canterbury, the highest spiritual court in the kingdom, in cases of tithes, presentations, inductions, immunities, testamentary causes, and generally of all those things, which though really objects of the civil power, are nevertheless under the cognizance of the ecclesiastical courts in *England*. From the principles already laid down, it necessarily

* Spelman on Tithes, p. 56.

† I agree with Sir *Henry Spelman* that it is not prescribed as a perpetual law, that all the successors of the apostles should live upon benevolence and uncertainty. Thus erroneously taught John Wickliffe, *that ministers should not have any temporal possessions or property in any thing, but should beg.* Of which error *Oslander* thus spoke, (Epit. Hist. Eccl. p. 459.) *Illa Wiclevica superstitio perniciosa et seditiosa est, quæ adigit ministros ecclesiarum ad mendicitatem, et negat eis licere proprium tenere.*

follows, that there can be no part of the *civil* Establishment of Religion independent of, and placed out of the controul of that *civil* power, from which, *ex confesso*, it flows: for I call that only the *civil establishment* of religion, which the state grants, and which without the grant of the state could not be enjoined.

Although our ancestors fully admitted the primacy of jurisdiction or spiritual authority of the see of *Rome*, yet they frequently passed acts to prohibit that see from exercising the power and controul over the *civil establishment* of religion, in as full and ample a manner, as it had been formerly accustomed to do: holding themselves very justly entitled to prevent any applications to *Rome*, "whereby damage, prejudice, or impeachment, hath been or may "be done hereafter to him (the king,) or to his said subjects in "persons, heritages, possessions, rights, or any goods, or to the "laws, usages, customs, franchises, and liberties of the said realm, "and of his crown, &c." All these are, properly speaking, *civil* effects, and consequently cannot be produced by that *spiritual* power, which was given by *Christ* to his apostles. If the cause producing these effects, have ever been within the controul of the *civil* magistrate, as it certainly was supposed to be when our ancestors passed these and the like acts to check it: so must it ever remain until that God, who instituted the office of the *civil magistrate*, shall choose to alter it by diminishing or multiplying the objects of *civil* power.

Our ancestors kept always a check upon the pope's encroachments on the civil establishment.

All the acts of parliament passed before the reformation, were allowed by the nation, as they still are, to be acts of the proper competency of the *civil* or *temporal* power of the state, and possessed therefore all the efficacy and obligation, which can attend the acts of any supreme *civil* or *temporal* power upon earth.

Our acts of parliament are the acts of the supreme civil power.

We can refer to no authentic monuments of antiquity, which distinguish so exactly and so forcibly the true line of demarcation between the *spiritual* and *temporal* power, as the acts of the *English* parliament passed in the 13th and 14th centuries upon the rights and franchises of the church of *England*. The term *church of England* did not then mean, what it now does, an independent and distinct society of individuals differing in *doctrine and terms of communion* from other christian churches; but merely that part of the catholic church, which was composed of *Englishmen* admitting in common with other nations a *spiritual* supremacy both of dignity and jurisdiction in the Pope of *Rome*, as the universal bishop of the church of *Christ*, and as the centre of unity in the catholic church.

Church of England, what it formerly meant.

Our ancestors distinguished between the *spiritual* primacy of the pope, and his claim to any share of the civil establishment.

They distinguished between the real *spiritual* power of the pope, as the supreme head of the church of *Christ*, as they held him to be, and those rights, privileges, liberties and *franchises*, which the state gave or allowed to the *English* clergy as the *civil* establishment of that religion, which the nation then professed. These were so well known to the nation, and so generally allowed of, that in *magna charta* it was found useless to specify them, as they did the other laws referred to in the body of *that act*. It was very properly the first article, and is expressed in these short emphatic words: "That the *Church of England* shall be free, and shall have "all her whole rights and liberties inviolable." These rights and liberties which were meant and intended to be *granted* and *confirmed* by this act, were evidently supposed to consist of such things, as were of the competence or resort of the *civil* power to grant. Nor could they consist of the general rights and liberties of the church of *Christ*, because these would not be different in the church of *England* from the rights and liberties of the churches of *France*, *Spain*, *Poland*, *Hungary*, or other nations in communion with the see of *Rome*: nor could such rights be either granted or confirmed by any *temporal* or *civil* power whatever. The rights and liberties of the church of *England*, granted and confirmed by this act, were not the rights and liberties of any other church, or of any other than the English clergy: they were granted by the state, and consequently might be resumed, repealed, altered, or annulled by the state. For it is impossible, that a legislative body should be capable of doing any act whatsoever at one time, which the same legislative body may not at another time abrogate or alter*: for the existing generation is not bounden to observe any law, merely because it was passed by their ancestors, but because by the non-repeal the existing legislature actually consents to its continuing operative.

Magna charta.

In what a law consists.

Whatever was an object of legislation to our ancestors, must essentially be so to their posterity. Every law is but a formal expression of the will of the majority: a majority then at any time expressing a contrary will necessarily defeats the first law. Such is the essential nature of human laws, and such are the grounds of the axiom, *that the same power, which enacts, may abrogate.* Upon the nature and effects of these different statutes, Sir *Edward Coke*, in his report of *Caudrey*'s case, entered very fully into the discussion of what he calls "*The King's Ecclesiastical Law.*" (5 Rep.) The

* "It is against the nature of the body politic for the sovereign power to impose any "one law, which it cannot alter." Cont. Soc. L. 1. c. vii.

publication of this report, or rather argument in support of the king's spiritual *supremacy* over the church of *England*, brought forth the answer of Father *Parsons*, the *Jesuit*. Both these dissertations contain more learning than fair reasoning: and as they so intimately affect the subject of church property, I shall give them more than a passing consideration.

Controversy between *Coke* and *Parsons*.

Sir *Edward Coke*, notwithstanding his usual minuteness, method, and precision, appears, through this whole report, to be wholly inattentive to the origin, nature, and effects of that *spiritual jurisdiction*, by which the church of *Christ*, according to the church of *England*, continues to be governed: he confounds it with what he calls the *jus regis ecclesiasticum*. In discussing a matter, which required some knowledge of practical theology, and a large portion of impartiality and candour, we must not wonder, that this great lawyer should have fallen short of his usual accuracy and success in argument. There needs surely no other proof of this, than his extravagant attempt to derive the *spiritual* jurisdiction, by which he assumes the church of *Christ* to be governed, from the ceremony of anointing the sovereign at the coronation. *Reges sacro oleo uncti sunt spiritualis jurisdictionis capaces.*

Sir Edward Coke.

Father *Parsons*, on the other hand, though he lost not sight of the real question, which was, whether any particle of that *spiritual power*, which *Christ* gave to his apostles, and which all admitted by succession to exist in the governors of the church, were vested in the sovereign by right of his crown; yet has he betrayed more ignorance of the common, canon, and statute laws of this realm, than a person of his learning could have been suspected of. He most inconsiderately and unwarrantably extends the spiritual power of the church to subjects evidently within the competency of the *civil* power, and of course out of that of the *spiritual*.

Father Parsons.

I have before expressed, that before the Reformation, by the laws of this land, (or concession of this community,) the Pope of *Rome* was, in some respects, allowed by the legislature to be the head of the *civil* establishment of religion in this kingdom; in all other respects the king was the supreme executive magistrate, or head of that *civil* establishment. Since the Reformation, the king has been the only and exclusive magistrate, or head of the *civil* establishment of religion in *England*. Every one of the precedents and arguments adduced by *Coke* in his report of *Caudrey*'s case goes to prove, what his antagonists ought not to deny, viz. that whatever *civil* establishment or sanction the *Roman Catholic* religion enjoyed in *England*, depended upon the *civil* legislature, by which the

The pope allowed formerly to partake of the headship of the civil establishment of religion.

rights, liberties, franchises, and privileges, were granted to the church, or, more properly speaking, to the clergy of *England*. So, whether the head-ship or supremacy of this *civil* establishment were by the will of the nation committed, in some instances, to the pope, and in others to the king, its subsistence necessarily depended upon the continuance of that will of the nation, which alone gave it birth.

The pope's right dependent upon the nation.

It was fully competent for the nation, if they chose it, to allow such rights to the pope: and whilst that will of the nation lasted, he had a just, but only *human* right unto them: from the moment that the nation chose to allow them no longer, the papal claim unto them became, properly speaking, an encroachment upon the regality of the crown, and *civil* rights of the nation.

Mischief of claiming a *divine* title to *human* rights.

It is unfortunate for the *christian* church, that a *divine* claim was ever set up to rights, which evidently could only have been acquired by *human* title. So says Parsons *; "The bishop "of *Rome* had general authority over *England* in his (Edw. II.) "daies, not only in meere *spiritual* jurisdiction (which all the "bishops of *England* professed to receive from him) but also "in external disposing, when he would, of bishopricks and other "prelacies, notwithstanding all the complaints made in his fa-"ther's and grandfather's times about that matter, may be made "evident by many examples." The first of which example is that of pope *Clement* V. suppressing the *knights templars*, and appointing their lands to the *knights hospitalers*. This was certainly an act of *civil* or *temporal* power, and the learned divine observes, "That the decree was obeyed in *England* without resis-"tance." This may indeed prove the acquiescence of the nation, not their obligation to obey it: And if this decree of the pope had been looked upon as absolutely binding and compulsory, it would have been useless for parliament to have confirmed it, as Father Parsons assures us, after Walsingham it did. The next example is of the same pope's rejecting *Thomas Cobham*, chosen by *congé d'elire* to the see of *Canterbury*, who went to *Avignon* according to the custom of those days to be confirmed and invested by the pope; and his holiness appointing at his own motion and discretion *Thomas Reynolds* to that see, to whom he sent both the investiture and pall; at which the king and queen were greatly contented. Whoever admitted the collation of spiritual jurisdiction to be made by the bishop of *Rome* by confirmation, &c. must also have admitted his right of appointing in the first instance. We do not

* Answer to Coke, p. 279.

find the parliament *confirming* the appointment of archbishop *Reynolds*. Had he been appointed by the king, the *confirmation* must have been made from *Rome*. For confirmation imports the supremacy or transcendancy of that very power, by virtue of which the original act is done.

Caudrey's case.

The whole of *Caudrey's* case, which was an action of trespass for breaking his close, he having been deprived of his living by a sentence of certain ecclesiastical commissioners appointed under 1st Eliz. c. 1. immediately concerned the *civil* establishment of religion, which was the possession of lands in *England*, which could be neither regulated nor affected otherwise, than by the laws of *England*. Had indeed the *civil* power proceeded against *Caudrey* for administering the sacraments or preaching the word of God to his parishioners, he retaining the jurisdiction, which he had received from his lawful bishop by *institution*, then indeed would the *civil* power have exceeded their limits, and encroached upon the *spiritual* government of the church, which must by its nature, within the range of its proper objects, be for ever independent of the state. No power upon earth, but that which gave it, could deprive him of the spiritual jurisdiction, which he received from his bishop, whose attorney or delegate he was, for though by law after *institution* he acquired by *induction* a freehold or life estate in the land, glebe or tithes belonging to his parsonage, yet his spiritual faculties, mission or jurisdiction, by virtue of which he was authorized to minister the gospel to his parishioners, and they bounden to obey him could only be revoked, suspended, or annulled, exclusively by the bishop, who instituted him.

Parliament remedies abuses in the civil establishment.

In the year 1275 (3 Edw. I.) the parliament complaining, that the state both of the realm, and of holy church, had been ill kept, *pur ce que l'estat de son royaulme et de seynte eglise ad este mal menez*, they confirmed and settled the points, in which the nation complained abuses had existed. The first complaint was of the abuse of the hospitality of religious houses, by which they were so impoverished, that they could neither maintain their own religious nor give the charities, for which they were instituted: this was remedied by the act. The next abuse complained of was, that clergymen, who by the privileges of the church of *England* were exempted from trial and punishment by the lay courts, were not delivered over to their ordinaries: the act therefore confirmed the privileges, and enacted, "that they, which be indicted of such offences by solemn inquest of lawful men in the king's court, in no manner shall be delivered without due purgation,

so that the king shall not need to provide any other remedy therein." Hence it clearly appears, that the privilege, which the *English* clergy enjoyed of not being tried and punished by the lay courts, was originally granted to them by the state: it also appears that in these times, clergymen were indictable for offences in the kings' courts, and although their punishments were referred to the ordinary, yet were they so referred by the *civil* power, which also provided, in case due purgation were not made, that the *civil* executive power should provide a further remedy; which it certainly could not do, if the delinquent, by virtue of his order or otherwise, were not subject or liable to the *civil* power or jurisdiction of the state.

Statute of mortmain.

Four years after the passing of this act, (7 Edw. I.) the English parliament gave the most unequivocal proof of their possessing the supreme dominion of all the property in the kingdom, in passing the statute of *Mortmain*, which act prohibits the appropriation of lands to the church. But if the church can possess lands *jure divino*, or by any title paramount to, or independent of the *civil* power, then could not the *civil* power, by any act whatsoever, prevent, or hinder the church from taking them: and although it might be questioned, whether the power of hindering a specific appropriation of property, imported the *altum dominium* of it in the prohibiting power, yet when that power goes the length of forfeiting the property to its own use, for the very attempt of appropriating (even to God or the church,) there can be no room for doubting, whether the supreme dominion over the property vest in the supreme *civil* power of the state. In fact this *altum* and *supremum dominium* can not vest elsewhere: it is not in its nature transferable or extinguishable, and is incompatible with the like claim, or title of any subordinate individual or corporation.

Parliament directs the disposition of trees in church-yards.

In the 35th of Edw. I. (A. D. 1307) the parliament in directing by whom and on what occasions trees might be felled in church-yards, gravely and solemnly declared, that "Trees which be growing in church-yards, are to be reckoned amongst the goods of "the church, the which laymen, have no authority to dispose, "but as the holy scripture doth testify, the charge of them is committed *only* to priests to be disposed of." And yet this same legislature consisting of *laymen* (whatever clegymen were there acted in a lay capacity) after this declaration, make this singular law, and for this singular reason, "Yet seeing those trees be often planted "to defend the force of the wind from hurting of the church, we "do prohibit the parsons of the church, that they do presume to "fell them unadvisedly, but when the chancel of the church doth

" want necessary reparations, &c." Now what effect the use of the trees in defending the church from the winds could have in authorizing laymen to dispose of church goods, which they declare can only be disposed of by priests, I cannot discover. However the operative part of the statute, which, being still unrepealed, is as binding upon the nation at this hour, as if it had been passed in the last session of parliament, is what must direct our judgment and conduct upon the question: and by the operation of this act of parliament, which has operated for nearly 500 years upon the English nation, we are bounden to believe, that the *civil* legislative body did on this occasion exercise their supreme controul and dominion over church property: for to prohibit the incumbent, for the time being, to enjoy, profit, or dispose of these trees, and to direct and enjoin their particular and exclusive appropriation, is evidently to dispose of them to all intents and purposes. And thus on all occasions may laymen or the supreme *civil* power lawfully act, because in them alone such supreme controul and dominion over the temporalities of the church exist.

Parliament also applies the revenues of religious houses.

In the same year the *English* parliament in regulating the application of the revenues of religious houses exercised the full and supreme controul and dominion over them: first, by enjoining, that no part of them should be diverted from the laudable purposes to which the royal and other founders had intended and been enabled by the state to appropriate them: and then by specially prohibiting the application of any part of them to any foreign purposes, or to the order of any alien superior: though the act, which expressly forbids such spiritual superiors of the different religious orders to export or appropriate any part of the temporalities of their religious subjects, as expressly and unequivocally admits and acknowledges their *spiritual* jurisdiction, by which they are constituted the *spiritual* superiors, and by which their *spiritual* subjects owe them an obedience and submission neither liable to, nor dependent upon the civil power. " Moreover our foresaid lord " the king doth inhibit all and singular abbots, priors, masters, " and governors of religious houses and places, being aliens, to " whose authority, subjection, and obedience, the houses of the " same orders in his kingdom and dominion be subject, that they " do not at any time hereafter impose, or by any means assess any " talliages, payments, charges, or other burdens whatsoever upon " the monasteries, priories, or other religious houses in subjec- " tion unto them (as is aforesaid) and that upon pain of all they " have or may forfeit." Can any thing more clearly demon-

strate, that in the judgment of our ancestors, the *spiritual power* or *jurisdiction* gave no right or dominion over the temporal possessions of their *spiritual* subjects? And therefore the same legislators explicitly declared, that though they denied all right, power, or authority in these alien superiors over the temporalities of their *spiritual* subjects in England, "It is not the meaning of our "lord the king to exclude the abbots, priors, and other religious "aliens by the ordinances and statutes aforesaid, from executing "their office of visitation in his kingdom and dominion; but "they may visit at their pleasure by themselves or others the mo- "nasteries and other places in this kingdom and dominion, in "subjection to them, according to the duty of their office "in *those things only*, that belong to regular observation, and "the discipline of their order." A notable instance this of our ancestors' discrimination between the *spiritual* jurisdiction of the see of *Rome*, from which they allowed these alien superiors to derive their power, and their right and duty to resist any papal claims, pretensions, or assumptions of *temporal* and *civil* power within the realm of *England*.

Ecclesiastical immunities *jure humano*.

Some controversial writers, and they are seldom unprejudiced even upon facts, have attributed all the ecclesiastical immunities and privileges to a divine right, or at least to a grant from the pope, which they held to be paramount to the *civil* or any human claim or title whatever. The fifteenth article of the *articuli cleri* expresses the true and real ground, upon which these liberties of the church of England were enjoyed. *Gaudebit ecclesiasticâ libertate juxta laudabilem consuetudinem regni hactenus usitatam:* that is by the common law of the land: but the statute law may alter the common law: therefore must these liberties be liable to the controul of the legislature, which they would not be, if they were holden *jure divino*, by divine institution. Upon this same ground or principle by the fourteenth of Edw. III. (A. D. 1340.) *spiritual* persons' goods were not to be taken in purveyance, without the owners' consent: and their temporalities were not to be seized, "without good cause according to the law of the land and judg- "ment thereupon given."

Statute of *provisors*.

The grand assertion of the national rights over the civil establishment of the Roman Catholic religion was the twenty-fifth of Edw. III. commonly called the law of *provision* and *præmunire*, which put all purchasers of provisions from *Rome* for abbies and priories out of the king's protection. Of this law *Polydore Virgil* speaks thus: (lib. 19.) "King Edward the Third, of all

" other kings, by the sentence of his council (i. e. of his parlia-
" ment, *then generally called the great council)* did decree most
" horrible punishment unto those, that for the time to come,
" should in any part of the world obtain English benefices from
" the pope of *Rome*, or should carry any causes unto him, but only
" by appeal." Father *Parsons* the great advocate of the *Roman Catholic* cause in his day attributes the passing of this act " to the " influence of *Edward's* son *John of Gaunt*, who was a disorderly " man of those days, and much cried out upon by all the com-" monwealth: the king being then grown old and feeble as well " in judgment as in body, &c *." I doubt whether this reverend divine be perfectly correct in this statement: it does not tally with other historians: and about twenty-five years after this time Edward III. viz. in the fiftieth year of his reign, consented to an act of prohibition to arrest priests actually officiating at divine service; which though it be in support of the privileges of the church, and seems to clear this prince from any imputation of crushing the clergy, still it proves to demonstration, that priests were at other times liable to civil arrests, and therefore were not out of the controul of the *civil* powers.

Precise discrimination both of spiritual and temporal power.

It would be difficult more distinctly to trace and mark in what the *civil* establishment of the church of *England* then consisted, and upon what grounds it rested, and ought to be supported. The act does not even obliquely question or call in doubt the right of the bishop of *Rome* to confer *spiritual* jurisdiction by confirmation, investiture, or institution; but it only touches the right of nomination, election, or presentation, and induction, which are civil rights, as before observed, and appendant to the *civil establishment* of religion, and, therefore, necessarily under the direction and controul of the *civil* power. So says *Parsons* †; " This proveth no *spiritual* jurisdiction at all in any presenter; " but only power of presentation, which may be in any man " that hath the *jus patronatus*." Parsons therefore was warranted in contradicting the conclusion, which Sir Edward Coke drew from this act, that " then the common law giveth to the " king, as to the supreme, within his own kingdom, and not to " the bishop of *Rome* power to provide a competent pastor to the " church." To justify this deduction the right, (upon failure of the patron, ordinary, or metropolitan to present within the time prescribed) should have been established in the crown to appoint and provide the church with a competent pastor: and to confer

* Answer to *Coke*, p. 292. † Ibid, p. 295.

upon him, that *spiritual jurisdiction*, which his parishioners should be obliged to acknowledge and obey; whereas the king in this last instance, was by the act enabled to do no more, than the lay patron in the first, which was to present or nominate a clerk to be afterwards approved of and instituted or confirmed by the *spiritual* or *ecclesiastical* superior. So *Parsons* says rightly, "The prince "in this case, cannot put in a pastor immediately from himself, "*giving him spiritual jurisdiction over souls*: but must present him "to the bishop or metropolitan, to be inducted by him and endued "with that jurisdiction: which he should not do if his own au- "thority *spiritual* were greater than the said bishops or arch- "bishops *." It appears from the year books, which preceded the reformation, that by the common law of the land, an *English* bishop elected under a *congé d'elire* consecrated or even invested with the temporalities by the king, was not a complete bishop till he was confirmed by the pope; for this confirmation was the act, by which he received his *spiritual* jurisdiction or mission. This was expressly laid down, in the bishop of Salisbury's case (Hil. 41. Edw. III. 6.) "Although he be elected, it behoveth him to "be confirmed by the pope, and it may be that the pope may "refuse him for non ability or other cause, &c." "*Car tout "soit il eslie, il convient etre confirm del pape, et poit estre que le "pape luy voet refuser pur non abilitie ou autrement.*" This confirmation by the pope appears by other cases, certainly not unknown to Sir *Edward Coke*, to have been necessary for every *English* bishop: for it was holden in (38 Edw. III. Mich. 31.) that "even after election and *confirmation*, the freehold of his tempora- "lities, was not in the bishop before he had sued for them out "of the king's hands †."

Presentation a civil institution, a spiritual right.

Premunire for appeals to Rome.

The distinctive line of demarcation between the *spiritual* and *temporal* power is still more strongly drawn by the 27th *of the same king*, *st.* 1. c. 1. (A. D. 1353.) Under that act the penalties of *premunire* are incurred for suing in a foreign realm, (i. e. at *Rome*,) and impeaching judgment given in the king's courts, in any plea, *whereof the cognizance pertaineth to the king's courts, or of things whereof judgments be given in the king's courts.* This reservation or limitation clearly embraces all objects of the civil power; such are the possession and disposition of property, *real* and *personal*, wills, &c. but it goes not to affect the validity of the sacraments of *Christ's* church; the regulation of purely *spiritual* discipline, such as the mode of administering the sacraments, the form of rituals, the observance of feasts, fasts, &c. the active and passive requisites for conferring

* Answer to *Coke*, p. 295. † Roll's Ab. 881.

holy orders and *spiritual* jurisdiction, the conditions and effects of purely *spiritual* excommunications, suspensions, interdictions, absolutions, and what constitutes heresy and schism, &c. of all which things, the king's courts have no cognizance.

We clearly perceive by the statute of *circumspecté agatis*, 13 Edw. I. (A. D. 1285), which ascertains certain cases, in which the king's prohibition does not lie, that the rights and privileges of the ecclesiastical courts were not pretended to be paramount to, and independent of, the legislature: for the application to parliament to fix and determine the authority of these courts *christian*, and to limit the royal prerogative in controuling them, is a demonstration, that in the eyes of the nation at that time, both the authority of the courts, and the prerogative of the king, were under the superintendance and controul of parliament. This statute declares, that prelates shall not punish "for leaving the churchyard unclosed, or "for that the church is uncovered, and not conveniently decked, in "which case none other penance can be enjoined than pecuniary:" and several other matters, that neither the bishop nor the king were by the constitution empowered to command or enforce without the authority of parliament. Upon this principle was it, that the ancient writ of summons to parliament expresses one of the principal ends of the parliament to be, to see, and to protect the *civil* establishment of religion, *de arduis et urgentibus negotiis statum et defensionem ecclesiæ Anglicanæ concernentibus.* Statute of *circumspecté agatis.*

This transcendent and exclusive superintendance of the *civil* establishment of religion, which of course comprehends tithes and all other ecclesiastical immunities, was as fully acknowledged by our ancestors to reside in the state, whilst they admitted the *spiritual* supremacy of an universal bishop, as by their successors, who have refused to acknowledge that supremacy in the see of *Rome*. The profligate * king *John* sent Sir *Thomas Harrington*, Sir *Ralph Nicholson*, and Sir *Thomas of London*, as secret ambassadors to the grand *Turk*, *Admiralius Murmelinus*, to offer to embrace his religion and to make his kingdom tributary to him, which the generous infidel nobly declined accepting of, from the contempt he had of the base proposer. In the next, viz. the 14th year of his reign (by his charter of the 5th of May) he surrendered his kingdom of England and of Ireland to Pope Innocent III. *cum communi consilio Baronum*, as he inserted in the charter, binding himself from thenceforth to hold both as fædary to the pope, paying for them annually 1000 marks. He did homage and fealty to the pope by the hands of *Pandulphus* his legate, and this was accepted Profligacy of King John to the Turk and pope.

* 4 Inst. 13.

and ratified by the pope, as it is expressed in the *bulla aurea*. The futility of this surrender to the pope, appears from the parliament rolls (Rot. cl. An. 3. *Edw.* I. m. 9. in Sched.) "Pope *Gregory* "demanded of king *Edward* I. by letter the annual tribute of "1000 marks. The king answers, that without the prelates "and nobles of his kingdom, he can give no answer: and that "he was bounden by his coronation oath to preserve the rights "of his kingdom entire, and not to do any thing, which could "affect his crown, without their consent and advice."

Constitutional answer to the pope from Edward I.

Afterwards in the 40th year of Edw. III. the pope demanded of the king homage for his kingdoms, and all the arrears of the annual tribute granted by *John* (but never, it seems, paid) and threatened to proceed against him for recovery thereof: whereupon he convened his parliament, and they passed a very special act, which is not among the printed acts, but is to be found (Rot. Parl. 40 *Edw.* III. num. 8.) and in it they recite the whole matter, and enter minutely into the nature of the sovereignty and independency of this realm, and the unfounded claim, which the pope set up to a temporal authority over it, alleging truly by "the "prelates, dukes, earls, barons and gentlemen, that the said king "*John*, nor any other, could put himself, nor his kingdom, nor "his people, in such subjection (or vassalage) without their con-"sent and agreement; and that it appeared by much evidence "that if it were done, it was without their consent." And they pledged themselves to resist any attempts, that might be made by his holiness to enforce his claim.

Like conduct in Edward III. and his parliament.

Several acts were passed in the reign of *Richard.* II. which emphatically confirm these observations, and prove that our ancestors perhaps more seldom lost sight of the difference between the *spiritual* and *temporal* powers, than their successors. For by the 1st of that king, the legislature expresses the reasons and motives for their confirming the rights, liberties and franchises of the church, viz. "to nourish peace, unity, and concord in all "the parts of our realm." This was the only and proper trust and delegation from the community to the legislature.

Like conduct of the legislature under Rich. II.

By the 5th of this king, the sheriffs were commissioned to apprehend all preachers of heresy and their abettors. The legislature undertook not to examine, or to determine what constituted heresy: that they left to the church. They affixed guilt to these heretical preachers for preaching without license (i. e. without faculties, mission, or jurisdiction,) either *from the pope, ordinary, or other sufficient authority:* an avowal of the *English* legislature,

Legislative discrimination of the two powers.

that, allowing of a primacy of *spiritual* jurisdiction in the see of *Rome*, and that no spiritual jurisdiction could flow from the *civil* magistrate, the two powers were perfectly separate and independent of each other.

Their further discrimination.

Those legislators, who distinguished so very accurately the separate effects of each of the two powers, gave in the next year a fresh proof of their discrimination: for in the year 1383, they passed an act against aliens' purchasing church benefices in *England*: for although they admitted, that the chief pastor of the church could give license, mission, or jurisdiction to any person, alien or native, to preach the gospel of *Christ* in *England*, which was a pure *spiritual* power, yet as church benefices consisted of property, which is essentially subject to the controul of the state, they properly excluded aliens, *Pope*, and others, from all enjoyment, disposal, or controul over them. It was a further proof that they considered presentations as a mere *civil* right, subject to the jurisdiction of the king's courts, because the legislature, in the 12th of this same king, (*Richard* II.) passed an act, that the king's presentee should not be received to a church full of an incumbent, till he had *recovered it by law*. In a word, although this king, by a particular statute passed in the 2d year of his reign, enjoined all his subjects to pay obedience and submission to Pope *Urban*, against the anti-pope *Clement* VII. and therein called him *the only true head of the church*: yet he did not think it inconsistent with that declaration, *to enact, that the crown of England ought not in any thing touching the majesty or regality of the same crown to be submitted to the bishop of Rome, nor the laws and statutes thereof to be taken away or enabled by him*, &c. The conclusions, which Sir Edward Coke draws from these statutes are unwarrantable in the extreme. So far from proving, that there was any *spiritual* power in the king, they directly demonstrate that king *Richard* acknowledged the *spiritual* supremacy in the see of *Rome*, though he asserted his own temporal sovereignty and regality to be wholly independent of that see.

Resistance to papal encroachments by 3 Henries.

Parsons says that after the death of *Richard* II. * "entered and "ensued in the crown, three *Henries* of the line of *Lancaster*, "who had variable success in their lives and temporal affairs: "though in religion, and particularly in this point of controversy "about *spiritual* power and jurisdiction they were all one." He commends every one of them for submitting to the spiritual juris-

* Answer to the Report of Sir *Edward Coke*, p. 312.

diction to the see of *Rome*, and yet in each of their reigns (except that of the infant Edw. V.) some public national acts were done to check, limit, abridge, modify, or regulate the *papal* rights, claims, or pretensions over the *civil* establishment of religion in this kingdom. For the *civil establishment* of religion comprizes only such objects, as are under the controul of the *civil* magistrate, and may therefore essentially be varied, revoked, or suppressed by the same power, which constituted and established it.

Under Hen. IV. Under *Henry* IV. the liberties of the church of *England* were repeatedly confirmed: and yet those religious persons were made liable to a *præmunire*, who should accept of a provision from *Rome* to be exempted from regular or ordinary obedience; or from payment of tithes: forfeitures of all their possessions were incurred by those who should pay more than the usual, or accustomed first fruits, to the pope upon their promotion to ecclesiastical dignities. Provisions made from *Rome* of any benefice full of an incumbent were declared invalid; and the election to ecclesiastical promotions, it was declared, should be free, and not interrupted by the pope (or the king).

Henry V. Under *Henry* V. the rights and franchises of the church were again confirmed: and the ordinaries were empowered *(by parliament)* to enquire into the application of the revenues of certain hospitals and charitable foundations. The invalidity of provisions from *Rome*, where benefices were full of an incumbent, was again confirmed by the statutes. For the extirpation of heresy, powers were given to * justices of peace, justices of assize, (not to enquire, and still less to determine what was heresy, but) "to enquire "of those that held errors, heresy, or lollardy, and of their main-"tainers, and that the sheriffe or other officers might arrest and "apprehend them.

Under Henry VI. In the reign of Henry VI. (which Father *Parsons* says † "en-"dured most catholiquely for nere 40 years)," the rights and franchises of the church of England (which are nothing more nor less than the *civil* establishment, including tithes and church property of the catholic religion) were again confirmed. The same *freedom of persons* was granted to the clergy coming to convocation, as was enjoyed by peers coming to parliament. (A proof that they were otherwise liable to arrests.) In consideration of a subsidy paid by the clergy, the king granted a pardon of several offences and forfeitures to all priests secular and religious (proof of

* 5 Rep. *Caudrey's* case, 25. † *Par. Ans.* p. 326.

their liability to the *civil* power). In the 8th of this King the judges determined *, that excommunication made and certified by the pope, had no force to disable any man in a *civil* way, within the realm of *England*: and this was the law of the land: notwithstanding *Parsons* rather tauntingly deny it. "It groweth now "somewhat more loathsome and ridiculous to see Mr. Attorney "run so often to this common chimera of ancient common laws." Every determination of the judges, not made upon the statute law, is evidence of the common law, which can only be altered by the statute law: so that where no statute law affects the subject, the judges are bounden by their oath to judge by the *common law*. Yet in as much as by the common law of the land, certain civil effects were annexed to excommunication, which of course made a part of the *civil* establishment of the catholic religion in *England*, and this civil establishment could alone proceed from the *English* nation or community, we find these same judges allowing the disabling effects of *excommunication*, when it was certified in court by the ordinary, or archdeacon: and the year book gives this reason for the pope's excommunication and certificate not *civilly* disabling an Englishman *pour ceo que il n'est minister le roye, ne de sa court, because the pope is neither an officer nor minister of the king or his court.*

Most excommunications from Rome considered merely *civil*.

It further appears by the year books, which are evidence of what, at that time, was the common law of *England*, that the excommunication, of which the courts determined, and the books spoke, was looked upon so much a *civil* punishment, that the ordinaries were under obligation of removing it or of absolving the excommunicated party, whenever the king should order it, upon finding that there was not just cause for inflicting the punishment. So it was holden (14 H. IV. 14. †) that excommunication by the pope should not operate any disability of suing, for that the court could not write to the pope to absolve him, if the cause did not belong to him: and no man should be disabled by an excommunication imposed by any other person, than a bishop within the realm, to whom the court might write to absolve him, if there were cause for it. But neither the king nor parliament, in those days, ever pretended to exercise any jurisdiction or controul over the pure spiritual powers of the bishops, by way admitting to the sacraments and other rites of the church, those, whom the bishops thought unworthy of them. The *civil* effects of ex-

* 8 *Hen.* VI. fo. 3. † *Rolls.* Ab. 884.

communications, which were allowed of by the *English* nation, the legislators were conscious proceeded from themselves; and therefore, though they permitted clergymen to pronounce the sentence, yet they always kept up their power of controul over it.

Under Ed. IV. sanctuaries could not be made by the pope.

Under Edw. IV. the judges disallowed the claim of sanctuary made by the prior of St. John, within his priory, as granted by the pope: for by no right could the pope affect, or interfere with, the municipal laws of this land: but to secure criminals from legal process, by granting them a privileged recess within this realm, would certainly be a direct and immediate interference with the civil laws of the country: therefore the *civil* or legislative power was entitled to resist every encroachment and attempt upon its own rights. These R. catholic judges determined, that any application to *Rome* by the clergy, for any redress in ecclesiastical matters, which could be procured from the ordinary within the realm, was within the statute of *præmunire* (9 *Ed. IV.* 3.) "*Si clerke* "*sue auter home en court de Rome de chose espirituel, lou il poit aver* "*remedy de ceo en le court son ordinarie deins le Royaulme, il aura* "*un premunire, quia trahit ipsum in placitum extra regnum, ideo* "*in casu statuti.*" This proves, that our ancestors allowed a supremacy of jurisdiction in the see of *Rome*; for to a supreme court alone can an appeal be made: and this determination of the court supposes, that there might be *spiritual* matter, where a clergyman had not remedy from his ordinary, but only from the pope. Upon this case Sir *Edw. Coke* unwarrantably concludes, that every application to *Rome* was liable to a *premunire*, when the year book says conditionally, that he shall not have recourse to Rome, *where he may have his remedy in the court of his ordinary.*

Resistance to the pope's legate by swearing him at Calais to attempt nothing against king or crown.

Notwithstanding our ancestors shewed submission to the *spiritual* jurisdiction of the see of *Rome*, yet so jealous were they of the pope's usurping or assuming any *temporal* power over the state, that the * king and council stopped the pope's legate at *Calais*, and would not permit him to come into *England*, until he had sworn to attempt nothing against the king or his crown.

The few weeks of the infant Edward the fifth's reign were rather an *interregnum* than a reign: and during it no act appears to have been done concerning the civil establishment of religion.

The only determination during *Richard* third's reign upon any point affecting the *civil* establishment of religion, with reference to *Rome*, was in the case of *Peckham* and *Sondes* †, where the de-

* 1 Hen. VII. 16. † 2 Rich. III. 22 Mich.

fendant by appeal to *Rome* had procured a *breve* or order *(delegacy)* to the spiritual court to set aside a will. But it was resolved by the judges in this case, that such judgment of the court of Rome shall not prejudice any man at *the common law*; for if an excommunication be certified here, that such a man is excommunicated in the court of *Rome*, or for any thing, which is pending in the court of *Rome*, this shall not be any disability here; and the plea was rejected. This is a demonstration, that our ancestors, although they submitted to the *spiritual* primacy of the see of *Rome*, yet they would not, against the will of the community, allow of any power in the pope as the head of the church, that could produce a *civil* effect upon *Englishmen*, thus rightly marking the true criterion of *spiritual* power.

Pope no power over wills.

In the reign of Henry VII. who, as *Parsons* observes *, "ended "happily his life and raigne in the Roman catholic religion "without any change or alteration," we have a very remarkable and solemn declaration of the *English* nation touching the power of the see of *Rome* over *civil* or *temporal* objects in this realm.

The pope had excommunicated all such persons as had bought alum of the *Florentines*: and as many *English* merchants had purchased of them a quantity of alum, as a necessary commodity for the cloth manufactory, the year books inform us †, "that on the first "Saturday after the purification of the blessed Virgin, in the "parliament chamber, the chancellor put this question to the "judges; what should be done with the alum purchased of the "*Florentines*, that was then in *England*, because his holiness "the pope, had excommunicated all, who had bought it of the "*Florentines?* And it was answered by most of the judges: that "when merchandize came into this country under the safeguard "(or license) of the king, that the king should also give a safe-"guard (or warrant) to the merchant, that the goods should not "be spoiled (or damaged) in his country and especially by his sub-"jects." Being of opinion, that the sentence of excommunication published by the pope on this occassion, acted only upon a *civil* or *temporal* concern or object, and was of no validity in this country, they therefore ordered the alum to be restored to the purchasers, and the excommunication to be disregarded. *Et donques en conclusion tenend. q' les biens sert restorés, &c.*

Notable case of excommunication for buying alum of the *Florentines*.

To conclude these historical observations upon the interference and controul of our Roman catholic ancestors, over the *civil* esta-

New *civil* powers given to bishops to

* Answer to *Coke*, p. 340. † 1 Hen. VII. 10.

punish their clergy.

blishment of their religion, we shall find the full proof and confirmation of them in 1st of Hen. VII. c. 4. intituled "An act to "punish priests for incontinency by their ordinaries," by which it was made "lawful to all archbishops and bishops, and other ordi- "naries having episcopal jurisdiction, to punish and chastise "priests, clerks, and religious men, being within the bounds of "their jurisdiction, as shall be convicted before them, by exami- "nation, and other lawful proof requisite by the law of the church, "of advowtry, fornication, incest, or any fleshly incontinency, "by committing them to ward and prison, there to abide for such "time, as shall be thought to their discretions convenient for the "quality and quantity of their trespass," &c. By this act the legislature gave to the bishops a *civil* power, as *temporal* magistrates, to punish corporally by imprisonment, and to deprive *English* subjects of their liberty, as long as in their discretion they might think proper. This the bishops could not have done by virtue of their episcopal authority: nor were priests or religious, by their *order*, ever exempted from the jurisdiction of the temporal courts, but only by the grant of the supreme *civil* power.

Whence different laws arise and take force.

This right or power of the ordinary to imprison their *spiritual* subjects for incontinency, from the year 1485, became one of the rights and franchises of the church of *England*; but as it was of so recent a date, and we trace the commencement and grant from the act of Henry VII. there is no difficulty in forming our minds to the persuasion or conviction of its having been granted by the state. Thus stand all laws of the *civil* establishment of religion, which are generally comprised under the terms, rights, liberties, privileges, and franchises of the church: and these were repeatedly confirmed by our ancient statutes. Their origin and establishment were equally *civil* and *temporal*, whether they arose out of the common law or the statute law: for each law is the direct emanation of the will of the people, by which alone it acquires its binding force. The existing generation *wills* the continuance of an immemorial usage, which cannot be traced to its origin: and that gives sanction to the *common law*: the same will of the existing community gives continuing vigour and force to a written act of parliament, and constitutes the operative quality of the *statute law*.

Parsons's incongruity of argument on this subject.

Had *Parsons* been more attentive to the source, origin, nature, and effects of municipal laws in general, he would not have fallen into such incongruity of argument upon the *common law* of *England*. He denies*, that sanctuaries in England were granted or

* Answer to *Coke*, p. 332.

allowed by the common law of the land, asserting "that they had "and have from the see of *Rome* their franchises and liberties: "not from the common law, but from the canon and ecclesias- "tical." and * he expressly allows, "that it appeareth, that the "delicts of clergymen in those days being enquired of and pu- "nished only in the bishops' courts, and not in the temporal, "which was a dignity, and no small pre-eminence of the prelates "of England above many other countries, who neither then, nor "now, have the like absolute pre-eminence in all things, as hath "byn shewed. For divers cases and causes doe appertayne only "to spiritual courts in *England*, which are handled also by secular "magistrates in sundry other countreys: as namely that of testa- "ments, and the like. And this is to be ascribed to the special "piety of our catholyke kings and country." Can there be a more direct avowal, that these rights or franchises were granted to the church of *England* by the English community, and not by the see of *Rome?* Their continuance, therefore, depends upon the will of the *English* parliament, not upon that of the pope, or any other spiritual governors of the church.

Lynwood and Hale against Father *Parsons.*

Parsons seems little aware of his own assertions. He surely would not pretend that the see or the court of *Rome* could subject wills to the jurisdiction ecclesiastical in *England*, which are not so in other countries, without the consent and will of the English legislature. So said *Lynwood* some centuries before *Parsons* existed, that the cognizance of wills, *non de jure communi, sed de consuetudine Angliæ pertinet ad judices ecclesiasticos* †. *Consuetudo Angliæ* is the common law of *England*, and according to Sir *M. Hale* ‡, "It is the custom or law of *England*, that gives the ex- "tent and limits of their external jurisdiction *in foro contentioso*."

The object of these historical observations has been to prove, how invariably the practice of the primitive christians, and the laws and customs of our own nation, have supported the principles heretofore laid down. Upon the basis of truth alone can any institution rise into consistency, retain vigour, or acquire permanency.

What was done under Cromwell.

Ere I close these historical observations upon the state's giving a temporal support and maintenance to the ministers of the gospel, I cannot pass over what was done by that party, which usurped the government of the kingdom under *Cromwell.* I refer the more readily to the conduct of the predominant party in those days, because then prelacy was crushed, and the dissenters, or anti-episco-

* Answer to *Coke*, p. 338. † *Lynwood* exercit. de testamentis, cap. 4. in Clem. ‡ History of Common Law, l. 1. c. 2.

palians had the sovereign rule. It is difficult to find any historian of that troubled period devoid of partiality. *Dugdale* thus shortly represents the particular epoch to which I refer*: "Nor were "the *assembly of divines* sitting at *Westminster* less active; who, "having framed a new *confession of faith*, were hard at work in "adding quotations of scripture in the margent of their copies, "for justification thereof. And that this blessed *presbytereal go-* "*vernment* might be the more secure from danger, the houses at "Westminster passed an ordinance not onely for abolishing the "name, title, and dignity of archbishops, bishops, &c. but nomi- "nated, in whom their lands should be settled, &c.

"Moreover, as they took care to disable those of the clergy, "which were orthodox and loyal, from preaching any more: so "to encourage all others, who were for their turn, though not at "all qualified with learning, they gave liberty to every bold and "schismatical mechanick to preach, under the notion of *gifted* "*men*. To which purpose an ordinance was brought into the "house, and read, for approving of such illiterate persons to be "ministers.

"And that episcopal government might never return again, "they passed an ordinance for the sale of all the lands belonging "to the bishops, with special instructions therein for the con- "tractors and surveyors. Amongst which instructions, it is not "the least observable, that for the better encouraging of purchas- "ers, they should sell them at ten years purchase. Nay, such "was their care, to make this sacrilegious work as plausible "to the people as might be, that, besides the extraordinary pay "their surveyors of those lands had (viz. 20*s*. a day, and 5*s*. "a day to every boy, that did but carry the end of the measuring "chain) they gave special directions, that the gentry and other "popular men, residing in those parts where such lands lay, "should be feasted by the surveyors (which feasts amounted to "no small charge) saying *we must pay well and hang well*"

"About this time also, there was a committee appointed to "enquire into the value of all church livings, in order to the "*planting of an able ministry*, as they gave out, whereas in truth, "it was to discover which were the best and fattest benefices, to "the end, that the principal champions for the *cause* might make "choice of those for themselves (whereof some had three a piece, "and some four, as is very well known) it being apparent that

* A short View of the late Troubles in *England*, p. 224.

" where any small benefice was, there the church doors were " shut up. The more to justify which practice of theirs, I " could name an assembly man, who, being told by an eminent " person, that a certain church in the west of *England* had no " incumbent, askt what the yearly value of the benefice did " amount to; and he answering fifty pounds *per anuum*, the as- " sembly man reply'd—if it be no better worth, no Godly man " will accept of it."

Without any remarks upon the warmth of this colouring, I shall barely refer the reader * to the several ordinances of the lords and commons assembled in parliament in the year 1644 1647 and 1648, for securing and enforcing the true payment of tithes and other such duties according to the laws and customs of the realm. From these he will see how all the principles, heretofore laid down in support of a *civil establishment of religion*, were acted upon by that very party, from which at various times have arisen the loudest complaints against such *establishments*.

* Vide Appendix, No. I. and Schobell's and Husband's Collections.

BOOK II.

CHAP. I.

What Persons are now entitled to receive Tithes by the Law of England.

The provision made for the minister by the state is a substitution for the gospel contribution.

IT has been attempted throughout the first book to inculcate the general obligation of all christians to contribute individually to the support and maintenance of the priests or ministers, who administer the gospel to them, whenever the exigency requires. This conscientious obligation follows the jurisdiction, which the particular minister is invested with over those persons only, who are resident within the geographical extent of his jurisdiction, and who voluntarily * submit to that jurisdiction. Fortunately for this nation, the civil magistrate has enacted such laws as operate in ease of the consciences of those, who admit of the spiritual jurisdiction of church governors, by removing the wants and exigencies of the particular ministers, who might otherwise have called upon them for a *gospel contribution*. Human laws made by the will and sanction of the majority bind the whole of a community. When individuals do not voluntarily admit of this spiritual jurisdiction, but conscientiously consider some other person than the established clergyman authorized to minister the gospel to them, and therefore entitled to demand of them a gospel maintenance, the general commutation or state substitution, to which the law obliges them to contribute, may appear, as it really is, a double burthen, in as much as it certainly does not exonerate them from the legal obligation, and still leaves them to the conscientious duty of maintaining their own parson or minister. The duty of the legislature is to answer for the exigencies of the majority, which binds the whole. The conscientious right of a dissenting minority to submit to some other, or to reject the spiritual jurisdiction of the established minister, cannot be con-

The acts of the majority bind the minority.

* I say *voluntarily*: for the adoption of any mode of faith must be the free act of a free agent. The *civil magistrate* cannot enjoin, much less compel it. By preaching and persuasion was christianity established; by the same means must it be continued. No human power can force the belief of revelation.

trouled by the civil magistrate, provided it proceed to no external force or turbulence. But then it is not to be expected, that the conscientious scruples or objections of the dissenting minority should be commuted or relieved by any appropriation of public property against the will of the majority.

The corporate quality of the clergy.

The first essential quality, by which the *civil magistrate* enables persons to enjoy or hold tithes or other church property in England, is the corporate capacity, with which it invests them. This always was the case, even before the reformation. For then, although the state permitted individuals to give or consecrate their lands and other property for ever for the maintenance of communities of religious men and women, who chose to retire from the world, and live under the obedience of their spiritual superiors, in the observance of the three religious vows of poverty, chastity, and obedience, under different rules either of St. *Bennet*, St. *Bernard*, St. *Austin*, St. *Francis*, St. *Bruno*, or others, they were so moulded or formed by the civil laws of the state, as that their profession become a civil death: the parties professed, on renouncing the world, made their wills, and appointed executors, as if providing for their corporeal demise, and their inheritances went over, as if the parties professed had been naturally dead. The superior and community were on the other hand invested with a corporate capacity to preserve their property. In that corporate capacity they never died, and their corporate inheritances became therefore inalienable. The legislature found this to become inconvenient: and they put a check at least to its encrease by the famous statute of *mortmain*, which passed A. D. 1225 *. No particle whatever of this species of church property partook of that quality of commutation or substitution for the gospel maintenance, which belonged to tithes. The abbots or abbesses, or other superiors of religious orders, and their respective monks, nuns, or friars, had no spiritual jurisdiction, (except over their own communities, and they were all subject to their ordinary) no share whatever in the government of the church. At and after the reformation the *civil magistrate* withdrew the corporate capacity from all religious orders indiscriminately; and as their property never belonged to the individuals, so when they were resuscitated from their *civil* death, and divested of their corporate capacity, they could neither claim nor hold as individuals, what they had enjoyed till then in

Civil death.

Statute of mortmain.

Abbey lands no substitution for tithes.

* 9 Hen. III. c. 36. Vide the act, Appendix, No. II.

Transmutation of church property.

their corporate capacities *. Their property therefore reverted to the state, which had so long permitted it to be in *mortmain* or a state of inalienability; and therefore there could be no remainder or reversion to the heirs of the donors or founders, neither by express nor implied reservation. It became then the duty of the legislature to appropriate it to the uses best calculated, in their judgment, to promote and preserve the peace, welfare and benefit of the nation. Whether they did so conscientiously appropriate it, is immaterial to consider. They alone possessed the dominion of the property, and from them alone could any lawful title to it be derived. From this general transmutation of church property at the beginning of the reformation are the present titles of most lay possessors of church lands to be derived.

Difference between religious and secular corporate inheritances.

When the supreme legislature of this country, thought proper to divest all religious men and women of that corporate quality, which gave them a capacity to hold and enjoy property in the rights of their convents, whilst individually by their profession they were civilly dead and incapable of taking any property real or personal to their own use and benefit, it gave to other persons, whom it considered as church governors, or gospel ministers, a corporate capacity of holding and transmitting to their successors in the like function, mission, or quality, tithes and other church property in perpetuity. These provisions, having been originally substituted as commutation for the conscientious gospel maintenance, have been continued from the reformation to our times, as they will continue, whilst the nation continues christian, and shall think, as it now most wisely does, that the church governors, who minister to their respective congregations or flocks the spiritual

* Sir Robert Brooke, a most respectable expounder of our laws, published his grand abridgment in 1586, (28 El.) and *Tit. Non Abilitie* says, a bond made to a monk is void, nor shall his superior sue for it. He adds a N. B. *Profession* must be certified by the ordinary or vicar general. 31 *Ed.* III. 10. And under the same title, 2. The profession is the cause of the disability, and not the mere entry into religion: for if land descend to a person, who has entered into religion, (*that is, into some religious order and be not professed by taking the three religious vows,*) and is not professed, he shall have it. The contrary after profession. The difference produced by the several acts of parliament passed at the time of the Reformation is very explicitly set forth in Sir Henry Rell's Abridgment, which after Brooke's may be deemed the most authentic abridged exposition of the law, having been revised before publication by Sir Matthew Hale: in his title *Grant* he has the following words: "If an Englishman go into France "and there become a monk, yet is he capable of any grant in England, for that such "profession is not triable; and also for that all profession is taken away by the statute, "and by our religion since received, such vows and professions are holden void. I "have heard that in the 44th of Elizabeth, in one Ley's case, this was resolved accordingly by all the Justices in Serjeant's Inn."

things of the gospel, ought not to be left to the precarious, unsatisfactory, and onerous duty of voluntary contributions. At no time were these spiritual or ecclesiastical corporations deprived of their civil rights, or considered (as the religious were) *civilly dead.* Although they formerly were, as they still are, ecclesiastical corporations sole, yet they were *secular* and not *religious:* the latter whilst recognized by the state were dead in law: the former were so far considered to belong to the world (*Sæculo*) as not to be dead unto it: and the corporate capacity, with which they were clothed, abolished not in them, as it did in the religious, the capacity of holding and enjoying property in their individual capacities. These ecclesiastical *secular* corporations are alone now recognized by the law of the land. In such alone are the church property and tithes now vested. But these secular corporations are, notwithstanding, still subdivided, as they formerly were, into two classes: namely, into those which enjoy benefices or church livings with, and those which enjoy them without, *cure of souls.* The *vis termini* proves, that *spiritual jurisdiction* must ever attend those, which are enjoyed with *cure of souls.* These consist of all from the Archbishop and Metropolitan of Canterbury to the rural curate, who has authority under his respective superior or superiors to co-operate in the culture and care of some given part of the vineyard of Christ. Several ecclesiastical writers speak of rectories, which are *sine-cures:* as if the spiritual jurisdiction of the parish had devolved wholly upon the vicar. The *cure of souls* ever accompanies *institution*, or whatever act amounts to a delegation of real spiritual jurisdiction; which cannot proceed from the *civil magistrate*, as has been attempted to be proved. It was therefore holden by the court of King's Bench, in *Clerk* v. *Heath* *, *That institution is character indelibilis of cure of souls, being a delegation to the parson from the bishop, and to the vicar from the parson, out of which it is derived.* So much of the ancient *civil establishment* of religion was retained at the Reformation, as kept on foot certain ecclesiastical dignities or promotions, which carried not with them the *cure of souls.* Such are *deans, archdeacons, chancellors, treasurers, chaunters, prebends, or a parson where there is a vicar endowed* †: we may also add masters and fellows of colleges and several other such institutions, which although from the munificence and piety of the founders

Corporations with and without cure of souls.

Institution the criterion of the cure of souls.

* 2 Keble, 556.

† 3 Inst. 155. Lord Coke observes, that it appears in our books that *deaneries*, &c. are benefices with cure of souls: but they are not comprehended under the name of benefices with cure of souls within the statute of 4 Henry VIII. Wats. Comp. Incumb. 9.

were inalienably devoted to the clergy *in mortmain* are still continued to them in perpetuity to answer the specific ends of their founders or donors. However laudable the appropriations of such church lands and property may be, still they differ essentially in their nature from tithes, which are enjoined by the state to be paid in commutation of the gospel maintenance, as has been often observed.

Who of the clergy receive the substitution for the gospel maintenance.

As the laws now stand, these substituted payments are made only to the archbishops of Canterbury and York within their provinces, the several bishops within their respective dioceses, and the rectors, vicars, and curates within their respective parishes. It would be useless to consider what originally was the practice of the primitive church appropriating the contributions of the faithful before the regular establishment of parishes throughout Christendom, unless to trace thence the origin and spirit of the laws of England, by which rectors and vicars in most cases and *lay impropriators* in some are entitled to receive tithes *.

Ancient division of the church property.

" The " offerings and oblations of the people were collected for the use " of the church and all put into the hands of the bishop, and by " him were divided into four parts. One part to his clergy, an- " other to repair the churches, a third to the poor, and the fourth " to himself." The fourth, the thirty eighth, and the fortieth " apostolical canons plainly refer to this custom, where the bishop " is ordered to keep his own proper estate distinct from that of the " church, that neither the church may receive any wrong, nor yet " his own relations, whether wife, children or other kindred. That " this was the practice of the church in the apostles' days, probably " from St. Paul's precept to Timothy. *Let the elders that rule well* " *be counted worthy of double honour*, and that this practice was in " England settled upon the coming in of Augustin the monk, ap- " pears from Bede's history of that mission. Priests and deacons " living thus in common with their bishops were not denominated " from any proper parish or precinct of their own, but from the " see of the bishop, to whom they belonged: as a presbyter or " deacon of the church of Alexandria, of Antioch, of Rome, of " Carthage, of Ephesus or the like."

" As the number of the faithful encreased, it was found neces- cessary to fix a presbyter in some certain precinct to attend upon the service of God in that place. Upon this the council of Chal-

* An Account of Church Government and Governors, 98. supposed to have been written by Bishop Fleetwood, though published anonymously. In that book there is much sound learning and constitutional doctrine.

cedon decreed; *that no person should be absolutely ordained either priest or deacon, unless he was particularly designed to some church, either in the city or the country.* Yet though a priest was by this means obliged to be constantly resident at some particular church, either cathedral or parochial, yet was he not properly incumbent of that church in the sense we now understand a man to be an incumbent; that is, to be maintained by the church-dues arising within that precinct in his own right. The church revenues throughout the whole diocess were still collected and paid to the bishop, by whom they were divided into four parts and distributed as has been already observed: which custom continued in some places till the ninth century or longer."

Origin of parishes.

"It is said, that the division of parishes and the fixing of parish priests was brought into England by Honorius the Fifth, archbishop of Canterbury about the year 636. Probably all places became parochial by degrees, whilst places for public worship were built and maintained by the bishops out of the public revenues of the church, to which use a fourth part was annually allowed, as has been already observed. Places for this use were few, and the bishops sent one or two presbyters or a presbyter and deacon out of their colleges to supply the cure, and remove them from one place to another, or took them back again into the city, as they and their colleagues thought expedient. But when private persons were moved with a religious zeal to build and endow churches for the use of themselves and their neighbours, within a smaller boundary than belonged to the churches built by the bishops; having by this foundation obtained a right of patronage, they would not then suffer the presbyters, whom they had chosen and presented to the bishops to serve their cures, to be removed at the pleasure of the bishops. For it is certain, that the rise of patronage was originally obtained by the founding and endowing of churches. The council of *Orange*, A. D. 441, the council of *Arles*, A. D. 452. and the council of *Toledo*, A. D. 655. *Give leave to those that build churches to recommend to the bishops some persons to govern them, whom he shall be bound to ordain, if he find them capable of that office.* And the emperor Justinian also about the year 547, decreed, that the founder of a church or his heirs should present a person to the bishop, who should judge of his qualifications and ordain him if he thought him fit: and if he found him not fit for the cure, then the bishops should procure one that was fit for it. Had the bishops after this pretended to remove presbyters at their pleasure, it would not have been suffered. Whilst

all the revenues of the diocess were at their disposal, they might remove presbyters at their pleasure, because they were bounden to maintain them wherever they settled them; but this reason ceased in churches endowed by private persons. These endowments at length grew so numerous, that the bishops endowed their own churches too, which they had before maintained out of the public revenues; and thus, probably, all churches became parochial and had fixed incumbents. But this good order came in time to be strangely inverted by the alienation of tithes to religious houses first, and where they had been suppressed, to laymen, deans and chapters, and bishops, whose lands and manors were taken away in lieu of them."

What are the modern substitutions.

Although most of what formerly was abbey or church land, be now in the hands of the laity, yet is there little or none of the land now possessed by the clergy, which was not in their possession before the statute of *mortmain*. From the principles laid down it might seem to follow, that tithes should be primarily paid to the bishop, as the original, and in fact the only church governor, to which each christian within his diocess owes his spiritual submission or obedience. *A bishop has cure of all the souls of his diocess*, says *Watson* *. But for the ease and satisfaction of the governors, as well as of the governed, the *civil magistrate* has judged it expedient to invest the bishops with separate fixed estates in land, which consist not of tithes: and in some instances glebe is provided for the parochial clergy in lieu of all or part of their tithes.

How tithes are due of common right to the parson.

The law says, that tithes are due of *common right* to the parson: not to the bishop. But when the law substituted tithes in lieu of gospel contributions, it presumed that the chief church governor was placed permanently and for ever out of the want and exigency of that individual collection or contribution, which it undertook to prevent the necessity of. As this general system of commutation or substitution for the gospel maintenance, took place, whilst our ancestors acknowledged the supremacy of one universal bishop, and as many of the subsisting laws were engrafted upon that assumption, it will be necessary to resort to some of the practices of those ancient days in order rightly to understand the spirit and effect of the laws and usages of the present day.

The present appropriation of church property accounted for.

It is not to be concluded, that although some church property be possessed by the established clergy, who have no immediate jurisdiction or authority over the individuals, who may pay them tithes, or otherwise contribute to some part of the maintenance and

* Comp. Incumb. p. 13.

support, which the law of the land has allotted them, therefore they have no title or right to their enjoyment. The fact is, that the contributions anciently made to the bishop were intended to support not only himself, but all those his clerical coadjutors, officers and dependants, whom he found requisite for carrying on the work of the ministry. The first and most important of these are *deans and chapters:* who have now their fixed estates also, which they hold independently of the bishop. One principle only could have dictated all these several commutations or substitutions for a maintenance from the altar: namely the tutelary duty of the state to preserve the peace, harmony, and welfare of persons of every degree and order subject to its power and trust. The whole power of the *civil magistrate* is *fiduciary*. Every inhabitant of a particular diocess, does or is supposed to submit to the spiritual power of the bishop. The state eases him of any conscientious duty of oblations or contributions towards the maintenance of the bishop, and the like exoneration goes also to all instances, in which the state provides for those, whose maintenance and support before *civil* establishments existed, depended upon the bishop's discretion and means. The former was controulable by no power but the conscience of the bishop, which never could be placed wholly out of the reach of human influence: the latter rested with the voluntary offerings and contributions of the faithful, which must always fluctuate with the propensities of corrupt nature. In order therefore to place the bishop and the bishop's establishment out of the precarious dependance upon the consciences of his flock, the state has given them several independent and fixed maintenances in lands or other stable property. Hence it will appear, that *deans and chapters* and some other subordinate ecclesiastical or clerical offices, functions, or employments were originally established by our ancestors, and retained at the reformation, as they are still supported by the *civil magistrate*, as a provision for the general establishment of each bishop. What this originally was and now would be, if restored to its primitive institution, is clearly set out by the learned author of *an account of church government and governors*, a work which cannot receive higher commendation, than that of being thought worthy of the pen of bishop Fleetwood, who was so justly esteemed for his affection to the church of England and the constitution of the realm of England.

" * The bishop was originally the supreme governor of all Who the bi-

* P. 95. and Alibi passim.

shop originally was.

persons in his diocess in what related to the church; yet he had not, or at least did not act with, a despotic power. He was, as Ignatius says in his epistle to the church of *Smyrna*, the high priest bearing the image of God: of God I say, as to what relates to government, but of Christ with relation to the priesthood. However he did nothing of moment by himself alone; he had his presbytery or standing council of priests, over which he presided. With the assistance and advice of these he governed his church, and ordained more priests as occasion required. We have some little account of this college of presbyters in the scriptures, where they seem to be taken notice of as the governors of the church. Thus when a collection was made at Antioch, for the brethren in Judea, it was sent to the elders or college of presbyters, to be disposed of by them to others as they had need. The elders of the church of *Ephesus* were summoned by St. Paul to *Miletus*, and ordered to take heed to themselves and to the flock, over which the Holy Ghost had made them overseers. These two instances (as perhaps I might find more if I thought it needful) show, that though the bishop as I have already proved was the supreme pastor of the church, yet the *elders* or presbyters had some share of authority with him, as well in taking charge of the flock, as in disposing of alms and the church's goods. St. Cyprian also speaks of the presbytery or college of presbyters in divers places of his epistles. And St. Jerome says, that the church has its senate, even the company of presbyters. From all which we may be satisfied, that there was originally a constant standing presbytery to assist the bishop and take care of the flock together with him."

Ancient officiating ministers.

"At first, in the primitive times, the bishop lived together with all his clergy in common upon the voluntary offerings and oblations of the people: and he sent abroad his priests and deacons to officiate in several parts of his diocess, as was judged expedient by him. All persons at that time being looked upon to be under the immediate care of their bishop. Therefore it is ordained by the thirty ninth apostolical canon, *let the priests and deacons not attempt any thing without the bishop; for to him is committed the care of the lord's people, and he must give an account of their souls.* And Ignatius in his epistle to the church of Smyrna says, *let no one do any thing belonging to the church, without the license of the bishop.* Such as to baptize, celebrate the Lord's supper, and the like ministerial offices. *Tertullian* also speaks to this purpose. It remains for the conclusion of this matter *to give a caution concerning giving and receiving baptism. The chief priest, which is*

the bishop, has the right of administring it: from hence the presbyters and deacons receive a right to administer it also, but not without the bishop's authority. And so likewise St. *Jerome, without the command of the bishop neither priest nor deacon has a right to baptize.* And this is still the practice of the church of England, where no priest or deacon has a right to administer either of the sacraments, or perform any other ministerial offices without a license from the bishop of his diocese, except in donatives, which are true remnants of popery."

Canons.

"From the stipend, which was given to every presbyter and deacon out of the church revenues, and from the particular charge or cure assigned to each of them by the bishop at his pleasure with the advice and consent of his college, both presbyters and deacons were called *canons*, that is, the presbyters *canonici majores*, and the deacons *canonici minores*. For the civil law calls stipends *canonicæ pensitationes*. And St. Paul calls that part of the church committed more especially to his care, the canon *which God hath distributed to him.* Afterwards when some presbyters and deacons were taken off from the cathedral or mother church, and settled in remote parts of the diocess, then only those presbyters and deacons which constantly resided with the bishop preserved the name of canons; because, when fixed, parish priests were settled and maintained by their own parish; then these only, who lived with the bishop received the *canonicas pensitationes*, and had the general care of the whole church or diocess under the bishop. For when it was found necessary to have presbyters fixed in particular districts or parishes, the bishop would not leave himself destitute of a college or society to advise and assist him in conferring orders, disposing of the church revenues, and putting the canons in execution. Yet he made no new decrees or rules for the government of his diocess without assembling his clergy in a diocesan synod. Therefore, St. Cyprian writing to his clergy, says "as to those "things, which my com-presbyters Donatus and Fortunatus, "Novatus and Gordius have written to me, I can return no an- "swer by myself alone; since I determined from the beginning "of my episcopate to decree nothing by my own private sentence, "without your counsel, and the consent of all my people." All presbyters of the diocess (and perhaps the deacons too) had a vote in these diocesan Synods. But the executive power was wholly in the bishop, for the management whereof he had his standing college or society of presbyters residing with him in the city. Upon this account the ancient canons make an apparent distinc-

Diocesan synods.

Deans and chapters.

tion between the presbyters of the city and of the country. This standing counsel of the bishop are with us called the *dean and chapter*. And our law says, *that in christian policy it was thought necessary (for that the church could not be without sects and heresies) that every bishop should be assisted with a council*, viz. *a dean and chapter*. 1*st*. *To consult with them in deciding difficult controversies of religion*. 2*d*. *To consent to every grant that the bishop shall make to bind his successors*; *for the law did not judge it reasonable to repose such a confidence in him alone*. Those canons, who, together with the dean, manage the revenues of the church and govern the choir are called the chapter, *Quia sunt capita collegii*, says Spellman. The dean being head of the college of presbyters, without whose advice and consent the bishop originally acted nothing of moment, must certainly be the next person to the bishop himself, as well in the diocess, as in the choir. For it is a mistake to think the college of presbyters has no authority out of the cathedral church, for in conjunction with the bishop their jurisdiction extends as far as his. But though for many ages the bishop has acted too much by himself without advising with his college, yet from the beginning it was not so: as Pamelius has learnedly proved. And still of common right by the common law of this land, the dean and chapter are *Sede vacante* guardians of the spiritualties, and to them is committed the spiritual jurisdiction of the diocess. Is it then reasonable, that the dean should give place to the archdeacon, who acts only as his officer during the vacancy? And even when the see is full, derives his power from him conjunctively with the bishop, however this right has been usurped upon. This right of being guardians of the spiritualities during a vacancy is probably as ancient, as the apostles' days: that it was so in St. Cyprian's time within a hundred years after, is manifest from the epistle of the presbyters of Rome to those of Carthage, written just after the martyrdom of Fabian their bishop before *Cornelius* was elected. *It is incumbent on us, say they, who seem now to be prelates and instead of the pastor, to keep the flocks.*

Sede vacante guardians of the spiritualties.

Antiquity of deans and chapters.

"This is the original of deans and chapters, who were so much exclaimed against in the late times. They are no novel institution, as was then pretended, but that presbytery or college of presbyters, which the apostles, *Ignatius* and other ancient fathers of the church so often speak of. It is to be wished with humble submission, that our bishops made more use of them. That they would advise with them and be assisted by them in the government of the diocess. That they would call in their assistance

at ordinations to examine such, as are to be admitted into holy orders, &c. These and such like were the officers of the venerable college originally, though now they are so little used, as gives too many a just cause to think them an useless burthen on the church, and of no other use but to eat up the best of its revenues: It is therefore great pity they are not reduced to their primitive usefulness."

Some clerical institutions, which have been retained in the church of England took their origin from our ancestors' submission to the bishop of Rome, whom they admitted to be the supreme *ordinary* of every diocess in this kingdom, as well as in others, which communed with the see of Rome. When the legislature of this country ceased to recognize the supremacy of the pope, it thought proper to make some very express declarations and provisions, which had the effect of substituting or recognizing such powers, rights, and authority in our own metropolitan, as had been before allowed to exist in and to be exercised by the pope of Rome, in order that such part of the *civil establishment* as it did not alter, might appear to rest upon something like the grounds of its original institution. Therefore says *Godolphin* *." *The archbishop is the ordinary of the whole province:* and in some particular instances he is specially enabled, or rather declared to be enabled so to act. For "if the archbishop visit his inferior bishop, and "inhibit him during the visitation, if the bishop hath a title to "collate to a benefice within his diocess by reason of lapse, "yet he cannot institute his clerk, but he ought to be presented "to the archbishop, and he is to institute him, by reason that "during the inhibition his power of jurisdiction is suspended. "Likewise, by the statute of 25 H. VIII. c. 21. the archbishop "of Canterbury hath power to give faculties and dispensations, "whereby he can (as to plurality) sufficiently now dispense, *de jure*, "as anciently the pope did in this realm *de facto*, before the making "of that statute, whereby it is enacted, that all licences and dispen-"sations (not repugnant to the law of God) which heretofore were "sued for in the court of Rome, should be hereafter granted by the "archbishop of Canterbury and his successors." As the nation heretofore not only admitted the spiritual supremacy of the bishop of Rome, as an article of their faith, but some part of the civil establishment of the religion was also allowed to him by the civil magistrate, as the payment of Peter Pence, appeals to him in all causes of ecclesiastical cognizance relating to property or any other

Some modern clerical institutions founded on our ancestors submission to the pope.

The archbishop is the ordinary of the whole province.

* Rep. can. 19.

What part of the ancient papal jurisdiction transferred to the Archbishop of Canterbury and what to the king.

objects of temporal power*, &c. After the reformation all the real or what by our ancestors was supposed to be the real *spiritual power* of the pope was transferred or intended to be transferred to the archbishop of Canterbury, and whatever part of the *civil establishment* had been permitted to be enjoyed by the pope, then upon the revocation or resumption of the nation's right, reverted to and became revested in the crown, as by the will of the nation they have since remained. No gift, cession, or surrender of any rights inherent in the *civil magistrate* can be irrevocable, any more than any law, which is but an emanation or expression of the will of the nation, which binds only, whilst it remains unaltered and unrepealed. Whatever therefore was enjoyed by the popes of Rome by the former laws of England were precisely as revocable as any other laws. The nation, which gave and enacted, could withdraw and repeal. The will of the existing community is known only by the existing laws. By these laws, tithes are now payable and other church property appropriated to archbishops, bishops, archdeacons, dean and chapters, prebendaries, rectors, vicars and curates, all of whom are required to be in priest's or at least deacon's orders ; but as some part of these substitutions for gospel maintenance are by the laws of England paid to laymen, who have neither order, nor jurisdiction, it will be requisite to explain, whence this apparent anomaly in the law arises.

Concordatum between church and state.

The *alliance* or *concordatum*, that exists in this, as in most other christian countries between the *church and state*, and which must subsist wherever there is a *civil establishment* given to a particular religion, removes the difficulties, that might otherwise arise from the uniting or disannexing of dioceses or parishes : for as the real spiritual jurisdiction is limited to geographic boundaries, and the division of the country into districts or departments is an object of pure temporal cognizance, whilst the collation of spiritual jurisdiction is wholly out of its competency, they both therefore concur in all acts of this nature. The relations of *governors* and *governed*, which must be ascertained, before they can be exercised, follow the changes affected by the *spiritual* and *temporal* powers each within its respective competency.

Rectors.

It follows, from the division of dioceses into parishes, and the appointment of particular individuals to the care, charge, and attendance of particular parishes, that the reciprocal duties of the parson, who generally speaking is a rector, and his parishioners

* Vide *Church and State, passim.*

were ascertained; and by the law of paying tythes to the rector *de communi jure*, the maintenance and support of the rector by his parishoners became fixed and permanent *. From the time of his induction into a church, the rector thereof is accounted the proprietor of the tithe of the parish, whereto the church belongs, unless the contrary be shewn: that is, either from the personal incapacity of the incumbent, or from the parishioners setting up a prescription in *non decimando* or a *modus decimandi* †. Originally the parson "was he, that had the charge of a parochial church, "and was called the rector of that church: but it seems he is "most properly so called, that hath a parsonage, where there is "a vicarage endowed: and yet it is supposed that *persona* is the "patron, or in whom the right of patronage is; for that before "the *Lateran* council he had right to the tithes in regard of his "having erected and endowed the church, which he had founded. "The pastors of parishes are called rectors, unless the prœdial "tithes be impropriated; and then they are called vicars, *quasi vice* "*fungentes rectorum*: and curates are they, who for certain sti-"pends assist such rectors and vicars, that have the care of more "Churches than one." Vicars and curates.

The idea of paying tithes unto, or of the enjoyment of any beneficial property, by clergymen in orders, who either administer the spiritual things of the gospel to a particular flock, or perform those other spiritual duties or offices, which the bishop of the diocess may require to be performed for the edification and instruction of his spiritual subjects, as naturally falls into the spirit of the substitution, as of the original institution. But when tithes come to be payable to mere laymen, who may not even be members of the established church, who neither have, nor pretend to have the capacity or jurisdiction to administer the sacraments or other spiritual things of the gospel, the mind with difficulty connects practice and duty with principle. It will be remembered that, before the reformation, the pope of Rome was considered and allowed by the nation to be the supreme ordinary in every diocess, and had also a considerable share of the supremacy over the *civil establishment* of the religion then professed by the nation; and that there then existed many spiritual corporations, such as abbeys, priories, and other religious establishments, which have long since ceased to exist in this country, or at least to be recognized by the state. Out of these circumstances, which now no Lay rectors.

* Godolphin, 187. † Ibid. 188.

Appropriations or impropriations

longer exist, arose *appropriations* and *impropriations*; terms nearly, but not precisely synonimous. The geographical division of the country over which the *civil magistrate* extended its establishment having been (no matter whether at once or gradually) made by the civil power, the general ecclesiastical distribution of England into provinces, dioceses, and parishes, thence took effect, and each division and subdivision remained thenceforth separate and independent of each other, as to all *civil effects*: and the spiritual power, from which alone the spiritual jurisdiction flowed, cooperating with the *civil* magistrate, in order to prevent the confusion and collision of two independent and sovereign powers, rendered the extension of the *spiritual jurisdiction* always commensurate with the geographical boundaries of each division. It has before been remarked, that although by the common law or de *jure communi* parishes generally were chargeable with the payment of tithes to their respective pastors, on account of the duties, which the pastors had to perform to their respective flocks, *(beneficium propter officium)* yet there were glebe and other provisions often made for them over and above their tithes. Great land-owners, spiritual corporations, such as *bishops, deans and chapters, abbots, abbesses* &c. frequently built churches and endowed them. They of course, as such donors or founders, considered themselves entitled to the advowsons of the churches, which they had so founded: and as this right of patronage was a pure civil right, it was controulable by the state, as was also the induction or investment of the temporalities, which are objects wholly out of the competency of the spiritual power to interfere with. The only difficulty remained as to the collation of the spiritual jurisdiction, which the clerks presented, or even inducted, could not have from the *civil magistrate*; and yet for encouragement to the faithful of those days, when such pious appropriations of fortune were much encouraged, every mean was resorted to, in order to invest such donors or founders with a perpetual right, as it were, of making the parsonage in some shape private property; and therefore considering, in the doctrine of those days, the pope as the supreme ordinary through every diocess and the original source of all spiritual jurisdiction on earth, he to favour these foundations allowed such spiritual corporations as bishops, deans and chapters, and abbots, whose subjects were in holy orders, and therefore generally capacitated to serve the ministry, when called upon to exercise their functions, or to receive spiritual jurisdiction over a particular part of Christ's flock, to name their own clerks, whether chaplain, canon, or private monk in orders,

and keep the living in constant plenarty, or full of their own incumbent, independently and even in defiance of the ordinary, that is without presentation, institution, or induction: which at first seems, and not without reason, to clash with every principle of jurisdiction or Government: and the more so, as it was establishing an attorney to the bishop, (who has the cure of souls throughout every part of his diocess) not of his own but of another person's appointment or deputation. An *appropriation* then, properly speaking, is the annexation of a benefice to the proper and perpetual use of some *spiritual* corporation, as formerly to a religious house, and now to a bishopric, college, dean and chapter, &c. so that from the time of the appropriation, the appropriator or patron of the appropriated benefice or parish is perpetual *parson* thereof without presentation, *institution*, or induction. The nature of an appropriation is very distinctly explained by *Plowden*.

Particular description of an *appropriation*.

" * The justices were of opinion, that none but a spiritual " body politic or corporate, which hath succession, is capable of an " *appropriation*. For the effect of an appropriation, as to its ori- " ginal institution, was to make somebody perpetual incumbent, " and as such to have the rectory, and the houses, glebe, and " tithes, which are parcels thereof. And in that he is made parson, " he has the cure of the souls of the parishioners, in which case " he ought to be a spiritual person: for as a patron ought to pre- " sent to a church a spiritual and not a temporal person, so for " the same reason an appropriation ought to be made to a *spiritual* " and not to a *temporal* person, for the one has the cure of souls " as well as the other, and there is no difference between them, " but that the one is parson for life, and the other and his succes- " sors are parsons for ever. And therefore *appropriations* were " originally made to abbots, priors, deans, prebendaries, and " such others, who could minister the sacraments and perform " divine service, and to none else. And upon this principle it " was originally taken, that such *parsons imparsonees* could not " grant over their estates to any other, for at this day an incum- " bent of a parsonage presentable cannot grant over his incum- " bency to another, although he may make a lease of the glebe " and tithes, but he ought to resign, and then the patron and " bishop may make a new incumbent, so that the incumbency, " which is a spiritual office, cannot be granted over to another; and " by the same reason a perpetual incumbent could not originally

Parson imparsonee.

* *Grendon* v. *Bishop of Lincoln*, Plowd. 496—7. &c.

" grant over to another his estate, which contains the incum-
" bency and the rectory itself, which was the revenue of the incum-
" bent.

" And although originally appropriations were only made to
" such spiritual persons as could minister the sacraments, and per-
" form divine service, as abbots, priors, deans, and such like, yet in
" process of time they began by degrees to shake off that restraint,
" and were afterwards made to others, as to dean and chapter,
" (which is a body corporate consisting of many persons, which
" body together cannot say divine service,) and to nuns, (who were
" prioresses of any nunnery, and could not minister the sacra-
" ments, nor say divine service to the parishioners,) which was
" *grande nefas*, as *Dyer* termed it; and this was done under the
" pretence of maintaining hospitality. And in order to supply
" these defects in the persons, to whom such appropriations were
" made, who could not themselves perform divine service, a vicar
" was afterwards devised, who was deputed to priors, or to dean
" and chapter, and at last to abbots themselves, and to others, to
" say divine service for them, and he had but a small portion al-
" lotted him; and they, to whom the appropriations were made
" retained the great revenue, and did nothing for it; and as the re-
" venue decayed, so did preaching and hospitality in the parsonage,
" and other good works, which was a great misuse, as it seemed
" to the judges. And all this was done under the pretence of hos-
" pitality, which in fact was the ruin of hospitality, and especially
" in the parish, where it should chiefly be kept up. But yet such
" *appropriations* were never made but to a spiritual body, and
" which had successors and not heirs, in which succession the
" patronage, incumbency, and the fruits of the benefice might for
" ever remain; and a marriage was made between them, (as the
" Lord Dyer termed it,) so that the one should not be divorced or
" separated from the other at any time. And in order to perfect
" such marriage, it was requisite that the *patronage*, which is ano-
" ther thing than a spiritual body, should be in such spiritual body
" politic or corporate, which should be perpetual incumbent; for
" the patronage is a thing *temporal*, to which the incumbency,
" which is a thing *spiritual*, ought to be conjoined; and that can-
" not be, if they are in several hands, for separation and conjunc-
" tion are directly opposite and contrary to each other. Where-
" fore a spiritual body politic or corporate, being the patron, is
" only capable of an *appropriation*."

Whilst *appropriations* continued to be enjoyed only, as they

were originally intended, by *spiritual corporations*, and the nation generally held the Bishop of Rome to be the supreme ordinary, it is readily explained, how that supreme ordinary being a *spiritual* corporation, and consequently perpetual, should be able to delegate *spiritual* jurisdiction to any and every monk or priest, whom the perpetual patron or *appropriator* should name or appoint to serve the cure or administer the gospel to the flock committed to his charge, by way of perpetual confidence, that such bishop, abbot, abbess, dean and chapter, or college, would always take care to supply a proper and fit incumbent for the parish: and this general delegation or collation of spiritual jurisdiction to the *nominee* of the perpetual patron or appropriator by the supreme source of all spiritual jurisdiction, supplied the want of the solemn act of institution *toties quoties* in the ordinary cases of presentation of clerks to the bishop or diocesan ordinary. Hence may be explained what has been said by Doctor Godolphin, the most authentic expositor of our eclesiastical law, and who has been herein followed by most modern writers.

Appropriators had a perpetual institution from the supreme ordinary.

* It is a question at this day undecided, whether princes or popes were the first authors of appropriations. The practice of each of them is of great antiquity. " † But what way soever they came, " this is and hath been held for law within this realm, that albeit " the pope takes upon him to be supreme ordinary, yet no appro- " priation made by him, or by any authority derived from him, " was ever allowed or approved of by the laws of this realm: it " being held, that no appropriations within this realm can be " made but by the king, or by authority derived from him, and by " his license, and that all other *appropriations* are void in law. " An *appropriation* may be by the king sole, where he is patron, " but it may not be by the patron sole: *Grendon*'s case in *Plow-* " *den*, and 17 E. III. 39. An appropriation cannot be without " the king's license, *Ward*'s case, *Poph. Rep.* Nor will the ob- " jection hold against the king, to say, no man can make an ap- " propriation of any church, *having cure of souls*, (the same being " a thing merely ecclesiastical, and to be made by some ecclesias- " tical person), but he only, who hath ecclesiastical jurisdiction: " for such jurisdiction the king hath, and is such a spiritual person, " as may of himself appropriate any church or advowson, because " in him resides the ecclesiastical power and jurisdiction. And " therefore, in a case of *commendams* it was long since held, that

Appropriations now by the king, patron, and ordinary.

* God. Rep. Can. 220. † Ibid, 222.

" an *appropriation* made by the pope, could not be good without " the king's license. The like in a case of avoidance was vouch- " ed in *Caudrey*'s case, that the entry into a church by the autho- " rity of the pope only, was not good, and that he could not ap- " propriate a church to appropriatees to hold to their own use. " And in *Grendon*'s case it was resolved by the justices, that the ordi- " nary, patron, and king, ought to be assenting to every *appropri-* " *ation*; and that the authority, which the pope had usurped in this " realm, was by parliament, 25 H. VIII. acknowledged to be in " the king, who, as supreme ordinary, may appropriate without " the bishop's assent." It is evident, from what has been said, that as the ordinary, patron, and king *, ought to be assenting to every appropriation, the different rights and effects of *presentation*, *institution*, and *induction*, are thereby allowed to proceed from different sources. The ordinary is introduced for the very reason, on account of which the pope was formerly a necessary party, as the supreme ordinary: and therefore, at present, by the co-operation of the ordinary, that perpetuation of *spiritual jurisdiction* to the nominee of the perpetual patron, is collated *per continuum*, in lieu of a *toties quoties institution*, upon every change or alteration of the incumbent.

The several sources of presentation, institution, and induction.

But Godolphin and most other writers, (under correction it is said,) have attributed an effect to the 25th of Hen. VIII. that neither the spirit, nor intention, nor the words of the act import †.

* Poph. 144. Ward's case.

† *Church and State*, 504. My enquiry therefore is, what alteration in those laws was intended to be made, and in fact was made, by the parliament. The immediate question then for discussion is this: whether the parliament of that day did or did not undertake, or attempt to vest in the king, or in one or more of the national clergy that *supreme spiritual* power, which had till then been acknowledged in the Roman pontiff, as the head of the hierarchy. The different acts, which were passed in the 25th year of Henry's reign (A. D. 1533.) which is properly the first year of the Reformation, affect a variety of subjects relative to the civil establishment of religion, and the primacy of jurisdiction in the Bishop of *Rome*. (C. XX.) Not only the payment of any annates or other composition to the court of Rome was prohibited, but the very presentation or application to the see of Rome for confirmation of any bishop or archbishop, was forbidden. And by the new regulation, or order of electing, consecrating, and confirming archbishops and bishops (1), which is the law at this day, we find, that although the *civil* right of presentation, nomination, or election, be under certain circumstances vested absolutely in the king, who may appoint by letters patent, if the prior, or convent, or dean and chapter, refuse or neglect to elect: " Yet if any archbishop or bishop within any of " the king's dominions, after such election, nomination, or presentation shall be sig- " nified unto them by the king's letters patent, shall refuse, and do not confirm, invest, " and consecrate with all due circumstances as is aforesaid, &c. he shall incur a *præmu-*

(1) Vide Jura Anglorum, p. 617.

In a word, no particle of the power of the *keys*, which that and the other subsequent acts of his reign presume to exist in the christian priesthood, (not in the civil magistrate), either was in fact, or was intended to be transferred to the king from the bishop of Rome. When *Plowden* says *, that "such authority and jurisdiction as "the pope used to exercise within this realm was acknowledged "by the parliament, in 25 Hen. VIII. and in other statutes, to "be in the said King Hen. VIII. so that he might lawfully exercise

"*sire.*" Where a power controuls a *civil* right, the ultimate exercise of the power is properly reserved to him, in whom it supereminently resides: and as the king is the supreme head of the civil establishment of religion, therefore is the last and definitive right of presentation given to him. But in respect to the collation of *spiritual jurisdiction*, and the constitution of a bishop or church governor, as this is an act, which essentially affects the very quintessence of *spiritual power*, and the government of the church, over which the state can have no authority nor controul, the act pretends not to give to the king, in the last resort, the exercise of the power of conferring spiritual jurisdiction, though it inflict the severest penalties upon others refusing or neglecting to do it, in whom the right of conferring it is allowed to exist. By this law, therefore, the King of England is presumed fully as incapable of conferring *spiritual jurisdiction* as *holy order*. The alteration intended to be made in the common law of England by this statute, was evidently this, and this alone: That whereas until that time, a bishop elect was not a complete English bishop, by common law, till he had been confirmed by the pope, so from thenceforth, this confirmation by the pope was no longer to be a necessary condition to make a person a *legal* bishop; but by statute law, this act of confirmation was directed to be made by English prelates instead of the Roman pontiff, in order to make a person a complete *legal* English bishop.

The next act which passed, (C. xxi.) was absolutely to prohibit the payment of all pensions, censes, Peter-pence, procurations, or other impositions, to the court of Rome, which were matters clearly affecting the *civil* establishment of religion: and it also forbade any suit to Rome for licenses, dispensations, compositions, faculties, grants, rescripts, delegacies, &c. to the see of Rome; and directed all such applications to be in future made, either by the king or subjects, to the Archbishop of Canterbury; but that no new dispensations, different from such as were wont to be obtained at the court of Rome, should be granted without the license of the king and council. This exception could not extend to any thing but of a *civil* nature. Of this nature was the settlement of the first fruits and tenths of every ecclesiastical living upon the king, 26 Hen. VIII. c. xiii: But attention was had to the *real spiritual* power in the act, C. xiv. for nomination of suffragans and consecration of them: by which the king was enabled to choose one of the two, who should be presented to him by the archbishop or bishop, who wished to have such suffragans: and although it be said in the act, that the king shall give to the person of his choice, "such title, name, stile, and dignity of bishop, of such of the "sees above specified, as the king's highness shall think most convenient:" yet it is not meant, that any thing more than the civil dignity or appendages should flow from the king: for the act proceeds to direct how the king shall present the suffragan, elected and nominated, to the archbishop, "*to give him all such consecrations, benedictions, and ce-*"*remonies, as to the degree and office of a bishop suffragan shall be requisite.*" And it is further declared, that no suffragan shall have or execute any jurisdiction or episcopal power or authority, &c. but what shall be given by their respective archbishop or bishop, by commission, under their seals. Here is no attempt to draw spiritual jurisdiction from a lay source.

* Plowd. 408. Grendon v. Ep. Linc.

The king did not receive any transfer of real spiritual jurisdiction any more than of order.

"such jurisdiction as the pope used or was accustomed to exercise "within this realm," with submission, I contend, was only meant to extend to such things, as were within the competency of the civil magistrate, or in other words, such jurisdiction and authority as had been enjoyed by the popes under the grant, acquiescence, or submission of the English nation. As well might the king claim by that act the power of ordination, because the pope could have exercised it in England, had he been here present. As to every matter relating to the *civil establishment*, which the pope or the ordinary had or has power to affect, in that undoubtedly the king is *supreme ordinary*, as the pope heretofore was, whether by grant, acquiescence, or usurpation. This is readily accounted for in the case of Sir *John Pollard* and *Waldron*, where Dyer * and the other judges declared the law to be, that a resignation which the Dean of Wells had made to the king was good and effectual, inasmuch as the king was head of the church of England, and that it was as good, as if it had been made to the bishop, and thereby the deanery became void. "Wherefore all the justices agreed, that an *appropriation* made by the king alone without the bishop, is as good as if the bishop had made, or as it was taken in ancient time to be when the pope made it. The very existence of a deanery is essentially by the will of the *civil magistrate*, and therefore all jurisdiction and authority over it was lawfully vested in the crown by the supreme legislative power. However, in that great and leading case of *Grendon* v. *Bishop of Lincoln*, the learned and correct reporter expressly says, "*And so all the justices unanimously agreed, "that the ordinary, inferior and superior, the patron, and the king, "ought to assent to every appropriation.*" Such was the law in the 19th of Eliz. and such is the law of this day. But in more ancient times, appropriations were effected sometimes without the king, and generally without the ordinary. As to the second point, viz. what persons may make an *appropriation*, and how many in number ought to assent to it; all the justices unanimously agreed that the ordinary, the patron, and the king ought to agree to it, and these are *actores fabulæ*, as *Dyer* termed them. And first, the ordinary, inferior, or supreme ought to agree to it, because he is the principal agent in it, for he has the spiritual jurisdiction, and the act of appropriation is a spiritual thing, and the ordinary says, *appropriamus, consolidamus, et unimus*, as principal actor in the cause (as *Manwood* justice said,) because the cure of the church principally concerns the souls of the parishioners, *of whom the bishop has*

How far the king is supreme ordinary.

Who are necessary parties to every appropriation.

* Dyer, 293, 294. in C. B.

the charge within his diocess, for which reason the law has attributed to him *the principal part* in the *appropriation*. And, it was said, it appears in 6 H. VII. which then commenced, but was not adjudged until 11 H. VII. that an union and an appropriation belong to the bishop to do, and where a union was there made of a chapel in one diocess to a college in another diocess, the assent of both the bishops was pleaded, and a great number of cases and precedents in the book of entries were cited, where the bishop of the diocess had made *appropriations*."

Formerly the pope supreme ordinary.

"And that which the ordinary of the diocess might do, the same was used to be done within the realm by the pope, *as supreme ordinary*, who claimed to himself a supreme jurisdiction above all ordinaries, and was long suffered to be done by him, so that he used to make visitations, corrections, dispensations, and tolerations within every diocess of this realm, as the ordinaries use to do (as *Mounson* said), and he took from the bishops of this realm whatever and as much as he pleased. In consequence of this custom he used to make appropriations without the bishop, which were taken to be good, and the bishop, who was only looked upon as inferior ordinary, never contradicted or opposed this practise, but it was submitted to and accepted as good; for (as Manwood said) *in presentiâ majoris cessat potentia minoris*. And so an appropriation made by the pope alone, without the ordinary, was taken to be good. And hereupon *Manwood* cited the case in 29 Edw. III. in a *quare impedit* brought by the Earl of *Salisbury* against the prior of *Mountague*, where an appropriation was pleaded to be made by the apostle, with the assent of the king, without mention of the ordinary, which appropriation was allowed to be good, and the pope was called by the name of apostle. And many other cases were cited to the same purpose. And the pope used to make provisions, until he was restrained by the statute of 25 Edw. III. which provision was a designation of the person, who should be incumbent, and an admission, institution, and induction of him without going to the bishop. So that his authority was looked upon as absolute, and bound the bishop as his inferior in all his acts. And so it was agreed by the whole court."

Reasons why the ordinary and the king are parties to every appropriation.

Formerly an appropriation could be made without the ordinary (not so at present), because the pope was the supreme ordinary. Then we have seen, that whatever powers he was allowed by the nation to exercise over the benefice, property, and corporate capacity of the incumbent, were transferred to the king by act of parliament. But the pope over and above these powers claimed also by

a higher title the power of instituting and enabling to institute, which the act does not vest in the king even upon the contumacy or refusal of the archbishop and bishops to confer spiritual jurisdiction upon the king's nominee or patentee, so at present for the purpose of creating a perpetual incumbency, or in other words an uninterrupted continuance of spiritual jurisdiction in the *appropriator*, the ordinary becomes a necessary party evidently for the purpose of collating the spiritual jurisdiction. It is obvious, that permanent jurisdiction (until revoked) of so peculiar a quality must be drawn from the same source as occasional jurisdiction. This appears to demonstration from the very form of an appropriation * by the king, which does not even mention the word *institution*, though it do mention the words *presentation, induction, and admission*. The king, as *king*, is he, of whom all hereditaments corporeal or incorporeal (such are advowsons) are by the law supposed to be holden mediately or immediately. Now this patronage may possibly come to the king by escheat or otherwise, or he may have the benefit of it by lapse: all which eventual benefits the king is deprived of by the appropriation, and therefore at all times he ought to be a party to the transaction, in order that he may at least consent to his eventual loss or injury.

Disappropriations.

Appropriations may be dissolved in many ways, as if a *parson imparsonee* † *present another, thereby he has disappropriated the advowson, and made it presentable ever after, as Manwood said; for he said*, volenti non fit injuria, *but against his will no one can tortiously disappropriate it. And if a corporation, to which a church is appropriated, is dissolved, the church is thereby disappropriated (as the Lord Dyer said) and the lord, of whom the advowson is held may present to it;* and then the reporter makes the following quære; *if dean and chapter, or other spiritual corporation, be seized of a manor, to which an advowson is appendant, and the church be appropriated to them, and afterwards they make a feoffment or a lease of the manor* cum pertinentiis, *shall this disappropriate the church? For it seems to some, that by the course of the common law the advowson shall pass as appendant to the manor; but now by the statutes, which have made the king and lay persons capable of parsonages appropriate, the advowson is in such case severed from the manor by the intent of the acts, and in the grant of the parsonage appropriate, which may now be granted and transferred to common persons, the advowsons shall pass.*

Impropriations.

The benefices, rectories, or livings, which have since this act of

* Vide the form in Appendix, No. III.

† Plow. 501. Grendon v. Bishop of Lincoln.

Hen. VIII. come into lay hands are called *impropriations*, in contradiction to *appropriations*, which are in the hands of spiritual or ecclesiastical corporations, though *they have been frequently confounded*. There are computed to be 3845 *impropriations* in England.

Effects of impropriation.

We have seen how by means of *impropriations*, the payment and receipt of tithes and the enjoyment of some other church property have come into lay hands. The principles and grounds, upon which mere laymen, (even dissenters from the established church) who pretend to no spiritual jurisdiction or power, have become by law as well entitled to their tithes, as to any other hereditaments whatever, are not immediately reducible to the original spirit of the institution; yet it must be remembered, that when the civil magistrate established in this country the general payment of tithes, as a great part of the commutation or substitution for that conscientious obligation of each christian's contributing according to his ability and means to the maintenance of his gospel minister, it founded in that establishment many fundamental laws and rules of property, which must ever pervade the whole mass of the property of this country, whilst the christian religion is adopted, and a christian priesthood established in it. This transfer of tithes from *clerical* to *lay* hands, by impropriation, is not to be viewed, as a dispensation or release of the laity, or owners of property from paying their commutation, or substitution fixed by the state, but as a diversion of a part of the property, which had through the overstretched devotion, and eleemosynary zeal of ancient days been consecrated to the church, from the unalienable to the circulating fund of property, which through all its modifications and forms must essentially ever remain under the controul, and exclusively within the competency of the *civil* magistrate. In the same spirit, in which the *civil* magistrate did on the 25th of November, 1279, prevent the further accumulation of church property by the statute of *Mortmain* *, did the same civil magistrate in the year 1539, take a certain portion of *Mortmain* property out of the dead hands of the church, and restore it to life and circulation by the act † *for dissolution of monasteries and abbies*: since which, the patentees of the crown, and their representatives, (although laymen or women) are rendered capable of taking parsonages, *appropriate or impropriate* of dissolved monasteries.

Impropriations of adiversion of a part of the ecclesiastical fund from its original institution.

Churchmen and their advocates have frequently and loudly complained, that impropriations are an abuse and a robbery from the church and parish priests ‡. In fact the civil magistrate *quem*

* 7 Ed. I. † 31 Hen. VIII. ‡ Kennett's Paroch. Antiq. 433

penes est arbitrium et jus, although he diminished the property of the clergy by that act, and encreased the general lay fund of transferable property, yet was it not intended to touch the principle or practice of the system of *commutation* or *substitution*, which had then been long established, and was considered too sacred to be disturbed. These impropriations were a continuance of all the payments, which the community was before bounden to make by way of commutation or substitution for the gospel maintenance to their church governors, though paid into different hands. They are not any additional burden to the land-owner, who of common right is bounden to pay tithes of all, that renews or grows annually. It must not be imagined, that because this stream of church property has been diverted into lay hands, and that the possessors of it claim no spiritual jurisdiction, therefore the churches so *impropriated* have in the mean time remained without ministers, or the flocks without their pastors. Out of this system of appropriation arose vicarages: of which it will be requisite to make several observations; more especially as from various circumstances, relating particularly to the *appropriation* of so large a share of church property, more tithes throughout the nation are paid to vicars than to rectors, (properly so called). It is immaterial to consider when particular vicarages were carved out of rectories, as they all certainly were in England at some time or other: but it is clear, that the allotment of the vicar's maintenance being only a deduction from that of the rector or parson can make no alteration to the parishioner, who is by common law obliged to pay tithes of all his annual produce and encrease, in order to maintain and provide for the rector or parson of the parish, or in other words to the spiritual minister, who administers to him the word of God. It is then one and the same thing to him, whether he pay more to the vicar, and less to the parson (impropriate or not) or less to the vicar, and more to the parson or rector. Whence it may probably be inferred, that vicarages were originally neither more nor less than cures or curacies. For *ex vi termini* they were deputies or attornies to the rectors, *vice rectoris fungens, unde vicarius*, and were consequently temporary, revocable, and removable: but in process of time, either from the unwillingness of the old *spiritual* corporations, which had the appropriations, or the inability of the subsequent laymen, who became *impropriators*, the vicars, who performed the whole of the spiritual function, came to acquire a fixed permanent estate, interest, or right, not only of *jurisdiction* from *institution*, but also of property and dominion, from *induction*: and they were the spiritual pastors or ministers, who in fact ad-

Whence arose vicarages.

ministered the gospel to their flocks, and the law gave them a fixed, permanent, and independent right to a part at least of that *commutation*, or *substitution*, which the *civil* magistrate thought adviseable to establish, in lieu of the voluntary, though conscientious contributions to a gospel ministry. From an unbiassed attention to the original principles, upon which our ancestors formed their system of *commutation and substitution*, the laws of the land, as at this day they still exist, will be perspicuously seen and readily submitted to.

What a vicar is.

" * *Vicar*, is he, who hath that spiritual living, called a *vicarage*, " being no other than a certain part or portion of a parsonage, " allowed to the minister for his maintenance, introduced at that " time, when *impropriations* first began; both which livings, as " they are commonly called the church; so both such as serve in " them are called the *patron's clerks*. The *vicar* is usually ap- " pointed, and allowed to serve the cure, by him, who hath the " impropriation of the parochial tithes; for at the original of such " *impropriations*, a certain portion of the parsonage was allotted " and set apart from the rest, to maintain the vicar, who was to " serve the cure; so that now the priest of a parochial church, " where the predial tithes are impropriated, is called the *vicar* " h. e. *vice rectoris*. And it seems anciently they did sometimes " stile themselves *perpetual vicars*, because every vicarage, corpo- " ration like, hath a constant succession."

Our ancestors complained of the abuses of appropriations.

The *civil magistrate*, (i. e. our parliament) even whilst the nation submitted to the papal supremacy, was as distinctly precise in exercising it's rights over the *civil* establishment of religion, as it has been at any time since the reformation. Thus for instance in the year 1391 the parliament thought proper to provide in all future appropriations of benefices (a proof that abuses were then felt) that provision should be made for the poor and the vicar †. Within 10 or 12 years from that time, viz. in 1402 the legislature

* Godol. Rep. Can. 196.

† 15 Rich. II. c. 6. " Because divers damages and hindrances oftentimes have " happened and daily do happen to the parishioners of divers places, by the appropria- " tion of benefices of the same places: It is agreed and assented, that in every licence " from henceforth to be made in the chancery, of the appropriation of any parish church, " it shall be expressly contained and comprized, that the diocesan of the place, upon " the appropriation of such churches, shall ordain, according to the value of such churches, " a convenient sum of money to be paid and distributed yearly, of the fruits and pro- " fits of the same churches, by those that will have the said churches in proper use " and by their successors, to the poor parishioners of the said churches, in aid of their " living, and sustenance for ever; and also that the vicar be well and sufficiently endow- " ed."

again took this matter into consideration, and confirmed the preceding act of Richard II. They then "went a degree further, "by enacting that thenceforth *, in every church so appropried or "to be appropried, a secular person be ordained *vicar perpetual*, "canonically institute and induct in the same, and covenably "endowed by the discretion of the ordinary, to do divine service, "and to inform the people and to keep hospitality there. And "that no religious be in any wise made vicar in any church "so appropried, or to be appropried by any means in time to "come." Thus the *civil magistrate* in giving a corporate capacity and perpetuity to vicars, assimilated them nearly to rectors: not only in requiring them to be secular priests, and therefore not in any manner exempt from the power of the ordinaries, (as some religious orders claimed to be by special grant or indult from the pope as supreme ordinary) but also by requiring each fresh vicar to be specially enabled *toties quoties* to exercise spiritual jurisdiction by the institution of the ordinary, which was conformable with the spirit and practice of the original church government, and was calculated to avoid that monstrous anomaly of establishing an independent delegation under a principal, who did not delegate; and who notwithstanding he were allowed, permitted, and presumed to have the cure of souls through his whole parish, was thus forced to submit to a subdelegation of that awful responsibility to another person, without his privity, consent, approbation, or delegation.

Religious men not to be vicars of appropriations.

It would be matter of more curiosity than utility to enquire into the precise time of the endowments of vicarages. Till they took place, vicars had no separate or fixed estate in their vicarages, independent of the rectories or parsonages, of which they were originally parts or appendages †. Before the statute of the 14 Edw. III. c. 17. a vicar had no freehold in the glebe of his vicarage, for he could not before that statute have a *juris utrum* ‡ for his glebe. But by that statute vicars might have their writs of *juris utrum* of lands, tenements, rents, and possessions annexed, or given perpetually in alms, and recover by other writs in their case as far forth as parsons of churches or prebendaries. This act was passed A. D. 1340 §. So much indeed does the law favour the endowments of vicars, that if the original instrument of appropriation be shewn with a condition in it, that a vicarage should be compe-

When vicarages were first established.

* 4 Hen. IV. c. 12. † 2 Rol. Ab. 336.

‡ Is a writ which lies for a parson of the church, whose predecessor had alienes the lands or tenements thereof. F. N. B. 48.

§ Watt. Com. Inc. 195.

tently endowed, and no instrument or proof can be made of such endowments, without which endowment at first the appropriation had been void: yet if the rectory for long time be supposed, reputed, and taken to be appropriated, and the vicar all that time presented, instituted, and inducted, as a vicar rightfully endowed, it shall be presumed in respect of the continuance, that the vicarage was lawfully endowed*. And after a church is appropriated, and a vicar out of the same is endowed, the parsonage and vicarage are two distinct ecclesiastical benefices, and the parson and vicar have both of them *curam animarum;* the parson habitually, the vicar actually, by *Noy* in *Britton* and *Wade's* case †. And so it was agreed by the judges in the case of *Clark* and *Heath*, Mich. 21 Car. II. Banco R ‡. And it was also said in this case, that there are several churches in *England*, where there are vicars endowed with cure, and yet the parson had a concurrent cure, and both of them took the oath of canonical obedience: and a parson appropriate doth differ from another parson only in this, that he shall be *parson perpetual*, and the other but for life §. And therefore it is provided, that a benefice appropriate shall not be taken to be a benefice with cure, in any article of the statute about pluralities ‖: else it had been so, as it yet is by the *canon* law, in cases out of the statute. What is here said by *Watson* ¶, both of the common and canon law, must be understood of spiritual not lay appropriators: the latter of whom never were presumed at any time, or in any sense, to have *cure of souls*.

Presumption of endowments.

Vicars have cure of souls.

Lay impropriators have no cure of souls.

The inference from what has been said of vicars and lay impropriators, will, it is hoped, tend to remove some of the objections and difficulties raised against the enjoyment of tithes by the laity. It is the privilege and advantage of the laity: the hardship and deprivation fall on the church; and since these impropriate tithes have been converted into lay fees, they are become as transferable as any other species of property; and no man can foresee the extent of the mischief, which the disturbance of such leading principles and landmarks in the landed property of the country might not effect.

Impropriations prejudicial to the church.

* Tria. 37 Eliz. *Grimes* and others v. *Smith*, 12 *Coke*, 4 Mich. 8 Jac. B. R *Hunton* v. *Corbett*. 2 *Croke*, 252. † 2 *Cro.* 518. ‡ 1 *Sid.* 426. 2 Keb. 484, 556. 1 Mod. Rep. 11. § Roll's Ab. 2. p. 341. See 31 H. VI. c. 4. 17 Ed. III. 76. 5 Ed. II. *Quare impedit*, 165. ‖ Stat. 21 Hen. VIII. c. 13. ¶ *Colt* and *Glover's* case, Hob. 157, 158.

BOOK II.—CHAP. II.

Of Tithes payable by the Common Law of England.

What the common law of England is.

IN order to follow up and trace the title of tithe-owners to their properties or inheritances, the principles already laid down, and the facts assumed, proved, or admitted, must be constantly kept in view. The nature of property in *mortmain*, differs no otherwise from property out of *mortmain*, than by its transferable and descendible quality: the former being limited to successors in perpetuity, and unalienable by the actual possessors: the latter being alienable and open to all the possible limitations, to which other property is liable. All the common law of England, although originally written, must have pre-existed the time of memory, (viz. 11th July, 1189.) It is now operative only by prescription or immemorial usage, and not, like statute law, by the words of any particular written document, which, if produced, is only admitted to prove the immemorial usage.

Gospel ministers are here maintained by the common law.

By the common law the *civil magistrate* originally provided, as he still does provide, a commutation or substitution for the gospel maintenance of the public ministers of the christian religion, by charging the whole landed interest of the country and the industry of its owners, occupiers, and inhabitants, with the payment of tithes to their respective subordinate and immediate ministers or spiritual governors. Parochial ministers (be they rectors, vicars, or curates) are immediately subordinate to their respective diocesans and metropolitans. Enough has been said of that *spiritual jurisdiction*, which is presumed by the *civil magistrate* of this country to exist in church governors. The bishop of the established church * is as-

* This doctrine is very explicitly set forth in the before mentioned work attributed to B. Fleetwood, which I presume to be in unison with the general belief of the established church of England, p. 30. The first bishop then in the christian church was "our "blessed Lord himself, called therefore by St. Peter the shepherd and bishop of our "souls. His twelve apostles were his presbyters, and his seventy disciples; as it were, "his deacons. Whilst our Saviour lived on earth, he ruled and governed his church "personally, and though the apostles could preach, and baptize, and pronounce "remission of sins, which is the priest's office now, yet could they not perform "the functions of the episcopal office, to give others a commission to preach the gospel. "But when Christ was risen, and ready to ascend into heaven, then he enlarged the "apostolical power: and gave them authority to collect and settle churches, and to give "commissions to others as he himself had done. *As my father hath sent me, says he,* "*even so send I you.* And when he had said this, *he breathed on them,* saying, *re-*"*ceive ye the Holy Ghost.* Signifying to them by this emblem of breathing on them,

sumed to have derived his spiritual jurisdiction by succession from the apostles in the christian Church. In the gradation of the hierarchy, the archbishop consecrates and confirms the bishop: the bishop institutes the rector and vicar: the rector and vicar are enabled by the tacit or express license of the bishop, to call to their aid, and therefore lawfully to employ in cooperation of their ministry within their own parish or district, *perpetual or temporary* curates. The state, upon these assumptions, has separately provided for the archbishop and the bishops, and in part for the rectors and vicars by separate estates or glebe lands over and above their tithes. *Curates* are left to the maintenance of those, who chuse to employ them as coadjutors in their ministry. A rector or vicar either does or is supposed to nominate his curate. The legislature assumes the transcendent and original *spiritual jurisdiction* of the *ordinary* over his parochial clergy of every denomination throughout his diocess, therefore by the 12 Ann C. 12, *for the better maintenance of curates throughout the church of England*, upon the presumption, that neither rector nor vicar can *ad libitum aut arbitrium* subdelegate an attorney indifferently or independently of his ordinary, did the legislature specially empower the *ordinary* to appropriate a part

Provision for Curates.

" that they should be *baptized with the Holy Ghost* in a short time, and that they " should *receive power*, after that the Holy Ghost was come upon them. And there- " fore when they had received the Holy Ghost on the day of Pentecost, they began to " collect and settle the church, and to govern by those rules they had received from " Christ. It is certain, that the apostles by this commission received an additional " power to what they had before, viz. by the Holy Ghost's descending on them; Our " Saviour had sent them out to preach and baptize in his own life time, but now he " sends them even as he himself was sent by the father. It is most certain that they " could not be sent by him to be mediators and redeemers as he was: for *there is but one* " *mediator between God and man, the man Christ Jesus.* Therefore this new commis- " sion can be understood only of the same authority of exercising ecclesiastical discipline " (or *spiritual jurisdiction*) which Christ himself had received of the father, and of " ordaining others to the same office. By virtue of their first ordination whilst Christ " continued with them in the flesh they preached the gospel, but by this last, supplying " the place of their master, they themselves also created others with the same episcopal " authority which themselves had received. For it is plain, that this commission " was not merely personal to the apostles, but designed to continue in the church so long, " as it should be militant here on earth, because our Saviour, at the granting of it, pro- " mised to be with them *always even unto the end of the world.*

" When therefore the apostles had for some time exercised this episcopal authority by " themselves, because the number of the faithful daily encreased, and they themselves " were not to live always, lest the church should be destitute of this authority after their " deaths, they invested others with this power, whom they set over particular churches, " that they might ordain elders, and govern the flock committed to their charge within " the several precincts."— I have resorted to this authority in order to avoid the imputation of having raised any legal assumptions upon the subject which the generally received doctrines of the church of England do not warrant.

of the profits of the rector's or vicar's freehold to the suitable maintenance of the curate: leaving however the *quantum* to vary in the discretion of the *ordinary* from 20*l.* to 50*l.* per Ann. without throwing any additional burthen upon the parishioners. That act recites
13 Ann. that "Whereas the absence of beneficed ministers ought to be "supplied by curates, that are sufficient and licenced preachers, "and no curate or minister ought to serve in any place without the "*examination and admission* of the bishop of the diocess or ordinary "of the place, having episcopal jurisdiction." What modern curates are to rectors and vicars, vicars anciently were to rectors, until the state found it necessary and expedient to render vicars on account of appropriations or other reasons independent of their rectors. The common law therefore, overlooking all subdivisions of tithes between rectors and vicars, has generally rendered each parish liable to the payment of one tenth part of the increase yearly arising and renewing from the profits of its lands, the stock upon them and the personal industry of its inhabitants. Of common *right these tithes are due to the person, who has the cure of souls* * (otherwise *spiritual jurisdiction)* over the parish where they arise. To ascertain what these are, is the object of the present chapter. Special exemptions or exceptions from the general law shall be considered, as they occur in the course of investigation.

Early written documents of common law.

Whatever once was titheable by common law still remains so, unless it have been altered by statute. The closer to the time of memory we find any written document of what the common law then was, the more conclusive is the evidence of such general immemorial usage. Independently of the general rule of tithing by common law, which is open to a variety of incontestable evidence, I shall notice a very minute specification of titheable matters set forth in a public instrument of great solemnity published within about 100 years of the time of memory. It is a provincial constitution of *Robert Winchelsey*, who was archbishop of Canterbury from the year 1294 to 1313, given us by *Lyndwood* †. Such a monition or charge of the metropolitan could not make law: but the injunction, which the archbishop imposed upon all within his province to pay their tithe, was founded upon the presumption of the pre-existing law, which the archbishop thereby undertook to enforce still more strongly with the weapons of spiritual interdiction, censure, and excommunications.

* Bishop Warburton has said in his *alliance betwixt church and state.* 3d. Ed. 35. "It was the care of the *bodies*, not the *souls* of men, that the magistrate undertook to "give account of. Whatever therefore refers to the *body* is in his jurisdiction, whatever "to the *soul* is not."

† Provinciale, de decimis. p. 199, 200.

"As the sacred word hath ordered, that tithes should be paid with "full integrity and without any diminution of every thing, which "is renewed in the year, barring no season, therefore let every "parochial chaplain, rector, or vicar compel his parishioners to pay "their tithes by ecclesiastical censures. And we command in "virtue of obedience all and singular the rectors, vicars, parochial "chaplains and curates of parish-churches established throughout "our province, strictly enjoining them to admonish and effectually "to induce, and that each of them do admonish and induce, that "all and singular their parishioners do pay fully and without di-"minution to their respective churches the tithes under men-"tioned: viz. The tithe of milk from the first time of its re-"newal as well in the month of August as at other times; of "the produce of wood lands (or underwoods), of beach-mast and "acorns, pannage of woods, and of other trees, if they be sold: "of stews and fish ponds; of rivers, lakes, trees, cattle, pigeons, "seed, fruits, and beasts of the warren, decoys, gardens, orti-"lages, wool, flax, wine, and grains, turf in the places where "it is made and dug, swans, capons, geese and ducks, eggs, "dykerows (or *hedgerows*) bees, honey, and wax, game, work-"manship, and merchandize; also of lambs, calves, foals, accord-"to their value, and of all the produce of other things; that they "do duly satisfy the churches, to which of right they belong, "without deducting or retaining any expences, by reason of the "payment of their tithes, unless only on account of the payment "of the tithes of handicrafts and trades. But if they should fail to "obey their admonitions, let them compel them to the payment "of such tithes by sentences of suspension, excommunication, and "interdiction." The words, *quibus de jure tenentur*, evidently presuppose, that then (that is above 600 years ago) the law of the land, which we are now considering, was well known, and had been long settled.

Constitution of bishop Winchelsey within 100 years of the time of memory.

The general division of tithes from their nature is into three sorts, *predial*, *personal*, and *mixt*.

Division of tithes.

Predial tithes are all such as arise out of the mere produce of the earth, from the latin word *prædium* a piece of land or ground; as grain, grass, hay, wood, fruits, herbs, &c.

Predial tithes.

Personal tithes are such as arise and grow due by the profits, that proceed from the honest labour and industry of man, in personal work, employment, handicraft, occupation, artifice, or trade; as of carpenters, joiners, masons, taylors, fishers, fowlers, hunters, or any other employments.

Personal tithes.

Mixt tithes.

Mixt tithes participate in their nature both of *predial* and *personal* qualities, that is such as rise partly from the earth or land, where the thing or animal is produced, bred, or fed; and partly from the labour and care of man in the making, rearing, feeding, or perfecting thereof; such are cattle, poultry, honey, milk, cheese, eggs, and the like.

Great and small tithes.

There is another general division of tithes into *great and small*, *decimæ minutæ et majores*. This division is not determinable merely from the nature of the tithe; but from the person, to whom it is payable; that is whether to the *rector* or the *vicar*. This division might be more correctly and explicitly distinguished by the term *rectorial* and *vicarial* tithes. As this division of tithes arose out of the establishment of *appropriations*, it necessarily follows, that it cannot be invariably uniform throughout the kingdom. For the rectors, who employed vicars at first arbitrarily, and afterwards by law, allowed a certain share of the tithes to the vicar, who performed the spiritual functions and duties of the parish; such tithes as the rector retained to himself being presumed to be the more valuable, were called *decimæ majores*, and varied in different parishes. As this difference chiefly affected questions or disputes between rectors and vicars (there are 3845 *impropriate* rectors in England) I shall reserve this matter for future consideration, observing merely for the present, that what was said by Serjeant Rotheram in **Wharton* v. *Lisle* was not contradicted by the court, in which L. C. Justice Holt then presided A. D. 1693.

Rectorial and vicarial tithes.

Origin of vicars.

viz. "At the common law there is no such person known as a "vicar; the parson had all the tithes, and vicaridges began in the "reign of Hen. III. by a constitution of Pope Urban the eighth, "and afterwards the vicars became spiritual persons; and before "the statute of West. 2. a *quare impedit* would not lie for disturbing of a patron to present to a vicaridge; and till the statute "of 14 Edw. III. a vicar could not maintain a *juris utrum* against "the patron. When he is entitled to tithes, it must be by endowment or prescription; it cannot be by endowment in this case; "because the jury have not found it so: besides, flax was not sown "in England at the time, when the first statutes were made for "endowing of vicaridges."

Endowments.

The only criterion at present for determining what are the small or vicarial tithes in a given parish, is by the endowment or prescription: the former when pleaded must be produced; the latter is founded on a supposed endowment, which is lost. It is evident, that the mere nature, quality, or quantity of the tithe

* 4 Mod. 183. 5 W. and M. Pasch. in B. R.

cannot stamp it with the distinction of *great* or small, *rectorial* or *vicarial*. Grass and hay in some parishes are *great*, in others *small* tithes. For if at the time of the real or supposed endowment, the parish consisted wholly or principally of grazing land, it is not to be supposed, that the rector would have ceded the tithe of it to his vicar: and on the other hand, where grass and hay are vicarial or small tithes, the presumption is that the grazing or meadow ground was but an inconsiderable part of the cultivated land of the parish; the chief part of it being then laid down in tillage. As the endowment or prescription, which is founded in a supposed endowment, may vary in every parish in England, it behoves us first to consider what tithe is due and payable by parishioners in general throughout England, where no prescriptive exemption or exception can be set up. Such however has been the extent of interference by the legislature or deviation from the original payment of tithes, through the laches of incumbents, the imposition of parishioners, or the unadvised determinations of the courts, that few parishes are to be found in England, which pay their tithes in every particular according to the common law principles, usage, and practice of tithing. But inasmuch as every incumbent, being entitled *de communi jure* to tithes in kind, may always sue for them, and throw the *onus* of pleading and proving the exemption or prescriptive privilege either in *modo decimandi* or in *non decimando* upon the defendant, it is fitting to set forth what these are, without specifying whether they be great or small. An alphabetical * arrangement of tithes payable by common law may help the memory and serve the conveniency of the reader.

Uncertainty in the mode of payment in different parishes.

Acorns are considered under the name of *masts*, they were anciently called pannage. For acorn tithes shall be paid, because they grow yearly, as appears in the register fol. 49. So of *mast of* oak, (or beech) if sold, the *tenth penny* is payable for the tithe, but if eaten by *swine*, then the tenth of the value or worth thereof. N. B. No tithe is due of acorns eaten by the owner's pigs †.

Acorns.

Of *aftermowth*, (that is the *second mowth*), tithes shall be paid *de jure* ‡. But Sir *Simon Degge* held, that tithes were not to be paid of the *aftermowths of meadows*, unless the meadowing were so

Aftermowth.

* Vid. a more enlarged alphabetical arrangement of titheable things, with the authorities in Godolphin from p. 383 to 464, as the law stood in his days. His *repertorium canonicum* was published A. D. 1678.

† *Lyndw.* 200 *Gibs. Cod.* 676. 11 Rep 49. A. D. 1614. *Litt. Rep.* 40. Anonym. A. D. 1627. ‡ 1 *Rol.* 2b. 640. A. D. 1599.

rich that there were two crops of hay gotten in *one year*, then the parson should have tithe as well of the *latter* as of the *former crops* *.

It was however formerly holden, that no tithe should be paid of the after-pasture of the meadowland, that had been mowed within the year † yet it has been determined in a very notable case *Bateman v. Aistrop and others*, A. D. 1774 ‡, that such after *eatage* of the latter mowth is titheable.

Agistment. AGISTMENT is the keeping and depasturing of sheep, and every other kind of tame cattle or beasts. And this tithe is the tenth part of the value of the keeping or depasturing of such, sheep, cattle or beasts for the time they are *levant* and *couchant* on the land. It takes its name from the old *norman* word, *gister*, to lie, *(jacere)* and has this peculiar difficulty attending it, that it cannot be taken *in kind*, for as it is no otherwise cut or mown, than by the mouth of the animal, along with the other nine parts, and consumed at the same time, the person, to whom it is due can only receive the value of it.

Sheep pay agistment tithe. All *sheep* are liable to pay this tithe, from the time of their *last shearing* till the time they are slaughtered, sold, or removed out of the parish §.

So do beasts horses, and heifers. All *beasts* and, *horses* not actually yielding milk, nor employed in husbandry, heifers, from the time of their being weaned, till they calve; or should they be sold, or removed out of the parish before they calve, then from the time of their being weaned, till the time they are so sold or removed out of the parish.

Steers. *Steers*, from the time of their being weaned till they are killed, or sold out of the parish, whether *fat* or *lean* except during such time as they are actually worked in the *plough* or in the *team*.

Horses whether *colts* or *fillies*, are likewise liable to pay this tithe from the time of their being able to live without the mare.

Colts. *Colts* till they are sold or removed out of the parish, or employed in the business of husbandry.

Fillies. *Fillies*, till they are so employed or bear foals.

* *Deg.* p. 2. c. 3. † *Ald.* v. *Flower Bunb.* 7 A. D. 1716.

‡ 2. *Rayn.* 692. 3 Wood 460. 3 Gwil. 1048. The Rev. plaintiff in the suit published a treatise on agistment tithe, in which he reports his own case and gives the bill and other proceedings in the cause. The third edition of this treatise was published at Nottingham, in 1790. This publication has been censured by several gentlemen of the profession of the law, as not containing a correct report of his case. I cannot altogether subscribe to that censure. Unquestionably his book contains much useful information to all persons concerned in tithes.

§ Vide *Bateman* v. *Aistrophe*, 3 Wood. 460. et alibi ut supra.

All such sheep, beasts, and horses are to pay a tithe for their agistment during the time they have been so kept in any parish, according to the value of the keep of *each per week.*

The two general rules for payment of agistment tithe are, 1*st the parson is entitled to the tenth part of the produce of the land or the value thereof.* Two general rules for the payment of agistment tithes.

2*d. As often as a new increase arises so often a new tithe becomes due* *.

On this tithe the parson is only entitled to the *tenth part* of the produce of the land, or the value of it; he has no claim upon the occupier or owner of the stock for any part of his profit; whether the occupier gain or lose by the keeping of his stock. The consumption of the herbage is what is titheable, whether the cattle fatten or rot upon it; so that by the present doctrine the same land may pay three different tithes, or tithes three different times in the same year, viz. 1st. *hay in kind;* 2d. *agistment tithe for the eddish or after grass;* 3*d. for the grass after the eddish is eaten off.* The same land may pay 3 tithes in they ear.

And *sheep* may in the same year pay the several following different tithes, viz. 1st. *wool in kind* 2d. tithe of agistment, Sheep, how many tithes they may pay.

From the time they were shorn, till sold for slaughter or removed out of the parish for sale, according to the value of the keeping of each sheep *per week,* whilst kept upon *eddish or after grass, summer eaten land, or turnips when eaten* on the land †,

1*st. For sheep removed out of the parish before their next sheering.*
2*d. For such sheep as are kept afterwards in the same parish till shorn.*
3*d. For both sheep and beasts profitable and unprofitable.*

For feeding sheep, which some months after the time of the last shearing are turned to feed upon turnips, and when so fatted are all slaughtered, sold, or removed out of the parish, before they are shorn again. Sheep fed on turnips.

In this case where the turnips are not consumed by the occupier's own sheep, but by those of some other person, either of the same or any other parish, taken in to keep for hire, either at so much *per week each,* during their being so kept, the *tenth part* of the bargain is due to the tithing man, payable by the owner of the turnips, not by the owner of the sheep ‡.

* These rules arising out of the principles of tithing, have induced the courts to overrule the old cases in the books. From these it was long understood to be the law, that no tithes should be paid for the agistment and after pasture of land, that had once in the year paid tithes in hay: nor for the agistment of young cattle destined for the plough or pail.

† *Coleman* v. *Barker* 1725, Gilb. Eq. Rep. 232; whereby tithes are declared due for depasturing of sheep on turnips, though they paid tithe of wool to the full number.

‡ *Kirkshaw* v. *Isles*, 3 *Gwil. Mss.* 859. A. D. 1756.

But where the turnips are eaten by the occupier's own sheep, the tithe must be estimated, either *according to the value of the turnips per acre or according to the value of the keeping of each per week of the sheep, which have eaten them.*

Horses carrying coals, &c. which give no profit to the parson.

For *Horses* while they are kept for* the use of husbandry, no tithe shall be paid; if for sale or to carry coals, or for any other use that yields a profit to the owner, and none to the parson, tithe shall be paid for them †.

Guest horses.

For *Saddle horses* of travellers (not for one's own riding) or others taken in as *guests horses* tithe of agistment is due, because no profit otherwise accrues to the parson from such cattle ‡.

Owners of cattle on commons.

If a *Common* be depastured, the owner of the cattle (if known) must pay the agistment tithes, and not the owner of the soil, for the owner of the soil hath no profit by it §.

Alders.

ALDERS. The tithe of *alders* shall be paid, although they be of *twenty* years growth and more ‖.

Apples.

If the owner suffer another to pull his apples, the parson shall have tithes; otherwise if they be taken by persons not known; (for they are not titheable before plucking) unless they be taken after the proper time of gathering, through the neglect of the owner in letting them hang too long ¶: the 10th part should be separated from the 9 parts, where they grow **, and tithe should be paid of such as fall from the trees †*.

Ash.

ASH is timber and so tithe free, being of above *twenty years* growth. Yet in 1703 the court divided: whether if used for the plough and cart it should not pay tithe; and that it should be used in buildings to exempt it ‡*.

Asp trees.

ASP TREES, (with beech and cherry) have been deemed timber and tithe free in *Buckinghamshire*, where timber was scarce, and because at that time this wood was used for making arrows for the defence of the realm. But I doubt whether this be law at this day §*.

* *Pilewood* v. *Butler*. 1794. 2 *Anst.* 498.

† *Thorbill's* Case, *Helb.* 93. A. D. 1628. *Laurkins* v. *Wilde*, *Popb.* 126. A. D. 1617. *Hampton* v. *Wilde*, 2. *Cr.* 430 A. D. 1617, Where it is said, "It is a profit "*ratione fundi* as in case of barren cattle."

‡ *Underwood* v. *Gibbon*, 1715. 3. *Bunb.* though *Roll* (ab. 641) say otherwise, but that was on the supposition of their depasturing the aftermowth when the land in the same year had given tithe in hay.

§ *Bunb.* 3. in a note *Fisher* v. *Lemar*, 1720.

‖ 2 *Cro.* anonym, 199. A. D. 167. ¶ *Holt*, 100. ** *Borworth* v. *Limbrick*, 2 *Raym.* 845 A. D. 1777. †* *Lister* v. *Fey*, 1703. 1 *Wood* 424.

‡* *Gee* v. *Perch*, 1 Rayner 98. from *mss. Dodds*, C. B. A. D. 1703.

§* Anonym. 2 *Rol.* Rep. 83. A. D. 1619.

Where the body of the tree is priviledged, the *bark* shall pay no tithes, as in hop-poles * but no tithe is due of bark of wood of above 20 years cut and corded †. Bark.

Beans (and peas also) *set and planted in rows in fields*, are titheable to the impropriator or rector, *if the vicar cannot shew an* endowment or usage to the contrary ‡. Beans.

And in a very recent case §, Lord C. Baron *Macdonald* said, "with respect to the peas, there is no specific mode of tithing "that article to be found in the books. We must therefore resort "to principle; the tithe of it must be set out as soon as it comes "unto proper divisions or parcels, so as to let the 10th be seen "and judged of and husbanded."

Beech is by common law titheable of any age, unless as was before observed of asp trees. In *Lapthorn's* case ‖ Sir Edward *Coke* who was a *Buckinghamshire* man, said that *bucks* signified a *beech* and gave the name to that county, because it is good timber in that country; and observed that in his own parish, no tithe of timber had ever been paid, because the parson had a wood called the *tithe-wood*, for which he annually paid 4*d.* to the lord, of whom he held it; it being understood, that this wood was given to the parson, as a composition for all tithe wood, as none had ever been paid in that parish ever since. In 1724 an issue was directed to try the question, whether beech were timber in the neighbouring county of *Bedford* **. Beech.

Bees are reckoned among the things that are *feræ naturæ*, and tithe free; yet, being gathered into hives, they become the property of some particular person, and then lose that priviledge and are titheable, at least as to their produce, for it has been determined, that the tithe due for them shall not be paid in *kind* by the *tenth swarm*, but that the *tenth measure* of honey and the tenth pound of wax shall be sufficient †*. Bees in their wild state.

Of birch, tithes shall be paid, although of 20 *years* growth ‡*.

Broom is titheable, though dug up in order to clear the land for tillage, but otherwise if used for husbandry or fuel §*.

* Anon. 1 *Freeman*, 334. A. D. 1698. † *Greenaway* v. *Earl of Kent* Bunb, 98. 1721. ‡ *Gauby* v. *Burt*. Bun. 169. A. D. 1724. § *Mantell* v. *Payne*, 4 *Coxe*. 1504. A. D. 1798. ‖ 1 *Rol.* Rep. 359. A. D. 1616. ** *Bibey* v. *Hanby*. Bun. 192, A. D. 1724. †* 3 *Cro. Grimstone's* Case 463. A. D. 1634, and 1 *Rol.* ab. 651. and *Barford* v. *Norton*. Sir. *Wm. Jones* 447. A. D. 1629. as to the tithe of honey.

‡* 2 *Cro.* 199. *Anonym.* A.D. 1607. Vid. also *God. Rep. Can.* 389.

§* *Austin* v. *Lucas*, 40 El. *Afted God.* 390.

Calves. CALVES, by common law, are titheable annually: that is to say, the tenth calf is due to the parson when weaned and not before *. If above ten and (I presume) if under ten each calf is titheable; that is the tenth part of the value thereof, when taken from the cow, to be sold or killed, ought to be paid to the parson within the year.

In most parishes, some special prescription, or modus of tithing *calves* prevails, or is claimed: which will therefore come under future consideration. It will however be here proper to observe once for all, that the admissibility of a *modus* or special prescription, is evidence or rather demonstration, that what is established as such exception or priviledge differs from the common law, and *exceptio probat regulam;* therefore calves are titheable at common law. They are enumerated in the tithe list given by Linwood.

Cattle feeding on commons. CATTLE feeding upon wastes or commons, where the bounds of parishes are *uncertain*, shall pay tithes to the incumbent, where the owner inhabits, according to *Stat.* 2 *Edw.* 6. *cap.* 13. unless exempt by *custom* or *prescription* and limited to some certain incumbent †.

Chalk not titheable. CHALK AND CHALK PITS are not subject to tithe, being of the substance of the earth and part of the freehold ‡.

Cheese. Tithe of *cheese* can only be due, where tithe is not paid of the *milk*; so payment of the *tenth cheese* in one part of the year may be a good *prescription* for the discharge of titheable milk for the whole year §.

Cherries. CHERRIES (black) are subject to tithe ‖, *cherry* trees in *Buckinghamshire* were coupled with *asp* and *beech* in the case from 2 Rol. 83.

Chickens. CHICKENS of all poultry are only titheable when the eggs are not tithed **, I presume from analogy to the general rule of tithing young animals when they cease to be under the care nurture or protection of the hen.

Clay. CLAY is not subject to tithe, being of the substance of the earth †*.

Clover. CLOVER though of modern introduction, pays tithe in every form as often as it is renewed ‡*, as in every every crop of it cut; which ought to be set out in cocks, and not in swarthes. The seed

* *Egerton* v. *Still*, Bunb. 198. A. D. 1725. and *Kenyon* v. *West*, 1 *Wood*, 313. A. D. 1693. † *Sav.* 68. ‡ 1 Mod. anon, 35. A. D. 1669. and 2 *Inst.* 651. A. D. 1600. § Moore 909, *Austin* v. *Lucas*. ‖ *Chapman* v. *Barlow*, Bunb. 184. A. D. 1704. ** *Carlton* v. *Brightwell* 1 Pr. Wms. 462. A. D. 1709.
†* 2 *Inst.* 651. A. D. 1600. ‡* *Witherington* v. *Harris*, 1 *Wood* 445. A. D. 1704 *Collier* v. *Howes*, 3. Anst. 954. A. D. 1797.

and stalks pay tithes as grass *. In the year 1729 the court seemed to think that *clover* (and vetches) cut green and given to cattle used in husbandry paid no tithe †. But in a late case in 1798 ‡, the court made this to depend upon the sufficiency of other food for such cattle. Clover seed is not to pay tithe at the mill; but the 10th part of the stock, &c. is to be set out in the field, after it is severed from the ground §. Clover seed.

Coal being of the substance of the earth, is not titheable *de communi jure* ‖. This like other such substances, may be titheable by custom. Coal not titheable *de communi jure.*

** The time of payment of the tithe of colts (calves, kids, pigs) and such young cattle, is when they are so old that they may be weaned, and live without the dam, upon the same food that the dam eateth, unless the custom of the place confine the payment to any certain time or age. *Rabbits* being *feræ naturæ*, are not titheable of *common right*; (only by custom) †*. Colts.

Corn (comprising all sorts of grain) is a *predial* great tithe, and is usually tithed by the *tenth shock, cock, or sheaf* ‡*. Corn.

Cows (vide milk *postea*). Cows vide milk postea.

Dotards (or old decayed trees,) having been once priviledged, as *sylva cædua*, shall not pay tithes but retain their priviledge §*. Dotards.

Doves (pigeons) were formerly considered to be not titheable at common law, because they were considered to be *feræ naturæ*. Thus in *Flower* v. *Vaughan* ‖*: it is said Pr. *Richardson* "that for "fish in a pond, conies, deer, it is clear that no tithes of them "ought to be paid of right; wherefore then of pigeons?" *quod nemo dedixit.* So it was said doves in a dove cote may pay by custom §*, *ergo* not of right. Yet *Godolphin* says ¶. Tithes shall be paid *de jure* of young pigeons. Mic. 14. Jas. 1. between *Whately* and *Hambury*, resolved. *By custom* tithes may be paid of pigeons spent in a man's own house, but not so of *common right*. But if sold, they shall pay tithe. Doves.

Eggs are tithed in kind, or according to the custom of the place, which serves for the tithe of the tame and domestic fowl, Eggs.

* 1 *Roym.* 68 (*Dodds* mss) temp. Ja. II. † *Hayes* v. *Dowes*, Bunb. 279.
‡ *Mantel* v. *Payne*, 4 *Gwil.* 1504. § *Lloyd* v. *Bentley*, 4 *Gwil.* 1615. A. D. 1774. ‖ 2 *Ins.* 651. A. D. 1600. 2 *Keb.* 177. A. D. 1667. *Tucker* v. *Gorges.*
** *Degge* p. 2. c. 6. *Gibs.* 678. †* *Nicholas* v. *Elliot.* *Dodd's* mss. 4 *Gwil.* 1581. A. D. 1713. ‡* *God.* 394. §* *Watson* v. *Lady Mary Tryon.* 1751. Decided by Lord *Hardwicke* against several old cases 2 *Gw.* 827. and 2 *Raym.* 452. In Gwillim's *mss.* report of this case p. 840, it is said. "If any tithes of rabbits be due, they can be demandable only *by custom.*
‖* *Hetl.* 147. circa 15 Car. 1. †* Ano. 5 Vent. A. D. 1670. ¶ Rep. Can. 405.

where their young are not paid in kind; and where tithe of *eggs* is paid, there is no tithe of the young: and so *vice versâ*, where the tithe of the young is paid, there no tithe of eggs may be demanded.

Elm. ELM is deemed timber, within the priviledge of *sylva cædua*, or wood of *twenty years* growth, so as to pay no tithe, if it be of or above twenty years growth *.

Fallow. Determined, that if the parson have had tithe corn one year, and the land lie *fallow*, without sowing the *next* year, in order to be ready for plowing or sowing the 3*d*. year, the parson shall not have tithe for the 2*d*. year; because its lying *fallow*, meliorates the land, and gives the parson a larger tithe the 3*d*. year †.

Fens. FENS being drained, shall not be priviledged for the *first seven years* under the name of *barren land* ‡.

Fish. No tithe can be demanded of *fish caught in the sea*, or *in rivers*, nor even in *ponds*, and in *rivers inclosed* and not *common*, which being reckoned *feræ naturæ* are not *de jure* titheable. They are *quasi* in realty and go to the heir §.

Flax. FLAX is a small tithe and (like hemp) was payable *de jure*, but now by statute; ‖ every person who shall sow any hemp or flax, shall pay to the parson, vicar, or impropriator, yearly the sum of five shillings, and no more, for each acre of hemp and flax so sown, before the same is carried off the ground, and so proportionably for more or less ground so sown, for the recovery of which money, the parson, &c. shall have the usual remedy by law.

Fowl. Under the word *fowl*, are commonly understood *hens*, geese, ducks, turkies, &c. they are subject to pay tithes (either in *eggs* or in the *young*, according to *custom*) but not in both **.

Apples (and other fruit). *Of apples, (pears, plumbs, cherries* and the like,) when gathered, tithe *in kind* is due. Lord *Coke* said, fruit trees, if they have paid *tithe fruit*, and be cut down, and sold in *billet* or *faggot*, shall not pay tithe, for the fruit and tree be not of several kinds; but as they yield profit to the owner, which is the established rule for creating a tithe to the parson †*. It has been since determined that the trees shall pay tithes ‡*.

Fuel. Fuel of any kind, spent in the parishioners own houses, is not subject to tithe §*, according to the old doctrine. Yet it has since

* *Gibs.* 679. † 1 *Rol.* ab. so adjudged 7 *Jac* 1st. 642. ‡ *Ibid.* § *Nicholas* v. *Elliot*, 1713. 4 Gw. 1581. ‖ 11 and 12 Wm. III. c. 16. S. 1. Vid. also Append. No. IV. ** *Carleton* v. *Brightwell* 2 Pr. Williams, 462. A. D. 1728. †* 2 Inst. 652. A. D. 1610. ‡* *Grant* v. *Hedding and Ball*, Hard. 382. A. D. 1664. §† More. *Austin*. v. *Lucas*, 909.

been determined, that fuel used in drying hops, shall pay tithes because thence no profit arises to the parson, who received his tithes of hops before they were dried *.

If a person keep a house of *husbandry*, and make it appear that he used the *furzes for fuel*, or to make *pens* for his *sheep*, no tithe shall be paid †; but otherwise, if sold ‡.

Gardens pay tithes of herbs and plants, commonly called garden stuff, as parsley, sage, cabbage, turnips, saffron, and the like, which are deemed *small tithes*, and may be demanded *in kind*; though usually a certain consideration is paid for *these things*, either by *custom* or by *agreement* with the parson. If the custom be a *parochial custom*, or extending to gardens throughout the parish, the enlargement of a garden doth not make tithe due *in specie*; but otherwise if it be a *special prescription* for *this* or *that garden*. And the same doctrine holds as to *orchards* §. Gardens.

All garden ground shall pay tithes for the different crops; and turnips when they are pulled out pay tithes, though ever so often sown, and though upon the same land ‖.

A GLASS HOUSE which grows by the *labour* and *industry* of *man*, shall not pay tithe *in kind* (any more than a fulling mill), &c **. Glass house.

GRAVEL is not subject to tithe, as being of the substance of the earth †*. Gravel not.

HAY is of common right titheable in swarthes, windrows, or cocks according to the custom of the place; when mown green to feed deer, tithes thereof are due of *common right*, unless there be a *custom* to the contrary. Hay.

HEMP pays as *flax* by Statute, ut antea p. 124. Hemp vide flax.

OF HOLLY (so of *birch*, *alders*, and *maple*) tithe shall be paid, though above twenty years growth ‡*. Holly.

HONEY (and wax) ought to be paid in kind *de jure*, by the *tenth* measure. There is a consultation in the register for the tithe of honey (and of wax) §*. Honey.

HOPS are *de jure* titheable by the measure, after they are cut from the bind, and not otherwise ‖*. Hops.

Notwithstanding many cases, by which it has been determined

* 1 *Freeman* 334. 1698. † Doctor *Watts* case, 3 Keb. 18 Car. II. ‡ *Gould* v. *Jordon*, Bunb. 145. A. D. 1723. § *Perrot* v. *Markurck*, 1716. Bunb. 79. ‖ *Beason* v. *Watkins*, 1716. Bunb. 10. ** *Anon. Lit.* Rep. 314. A. D. 1629. †* *Gibs.* 680, and *Liff* and *Watts*. 34. El. *God.* 411. ‡* 2 Cro. 199. *anon* 5 Jac. I. §* Burns Ec. Law. II. 4to. Ed. 436. ‖* *Knight* v. *Halsey*, in Dom. Proc. 1800. 1 Bro. P. C. 333. and 4 Gwil. 1531.

Horses for saddle. that *Saddle horses* shall pay no tithes, any more than *cattle* for the *plough* and *pail*, or cattle killed for the use of a man's own family, in respect of the profit that otherwise accrues to the parson from these *; yet by the determination in *Bateman* v. *Aistrophe* the law now seems to be taken otherwise.

Houses. Of *common right* no tithe ought to be paid of *houses of habitation*, because they do not grow and renew by the year; of the statute composition for houses in *London* we shall speak hereafter.

Lambs. LAMBS are a mixed *small tithe*. They are titheable as *calves*. The *tenth lamb* is due to the parson by *common right* †. They are titheable when they can live without the dams, and when the owner weans his own lambs and not before ‡; and when they fall §.

Lead not. LEAD is exempted from tithe, being of the substance of the earth, and not annual. And therefore if tithe be claimed it must be by *custom* ‖.

Lime not. LIME is in the same predicament, being part of the freehold **.

Loppings. LOPPINGS OF TREES of the age of *twenty years*, or *above*, shall not pay tithe, (not even if they be cut every *ten* or *twelve* years): but it hath been made a question, whether such branches, if the trees be lopped before twenty years, shall not always pay for *loppings after twenty years*, in as much as at the first lopping the tree was not privileged †*.

Madder. MADDER was put under composition by various acts at 5*s.* pr. acre, the last expired in 1786 ‡*. I presume therefore it now pays as a small tithe, but probably the statute composition is generally kept up by agreement.

Maple. Tithe of *maple* shall be paid, although it be of twenty years growth and more §*.

Mast. MAST, vide *acorns* p. 117.

Milk. By common law, the parson is entitled to the 10th morning's meal of *milk* and to the 10th evening's meal of *milk* ‖* (that is I presume of cows, goats and ewes).

* *Underwood* v. *Gibbon*, Bunb. 3. 1715, where all the former cases are brought together. † Lord *Raymond*, 677. *Selby* v. *Clerk*. A. D. 1701. ‡ 2 Gw. mss. 530. 1680. *Croft* v. *Blake*. § *Boys* v. *Ellis*, Bunb. 139. 1723. ‖ 2 *Inst.* 651. ** *Amiers* v. *Chambers*, 22d Car. II. 2 *Keb.* 596. †* *Reynolds* case Mo. 762, *and Brooke* v. *Rayner*, 908. A. D. 1604, 2 Cro. 101. 2 Inst. 643. ‡* Viz. by 5. Geo. III. c. 18 which continued the former act for 14 years. Vid. append. No. V. §* 2 *Cro.* anon. *ut supra* p. 125.

‖* 4 *Wood*, 24. *Bosworth* v. *Limbrick* and others, 1777. This great milk cause went up to the lords, who affirmed the decree of the exchequer. It settled many doubtful and contrariant opinions about the mode of tithing milk (vid. Rayn. 809 and 934. 3 Gw. 1101. It was strengthened by another great cause, which met a similar fate in the lords in

And* if there be any *custom* in a parish for the manner of *tithing milk*, as to carry it to the *church porch*, or *parsonage house*: that must be observed by the parishioner; but if there be no particular custom or usage, the parishioner is obliged *de jure* to pay every *tenth meal*, to milk the cows at the usual place of milking into his own pails; and the parson is obliged to fetch it away from the milking place in his own pails, in a reasonable time; and if he do not fetch it before the next milking time, the parishioner may justify pouring the milk upon the ground, because he hath occasion for his own pails.

Mills whether predial or personal.

MILLS are of two sorts, either *corn mills*, or *mills for other uses*, as *paper mills*, *fulling mills*, and the like. *Corn mills* were formerly thought to yield a *predial tithe*, viz. the *tenth toll dish* from its belonging to the incumbent where the mill stands, and not where the miller dwells; according to the known distinction, that *predial tithes* are payable, where they arise; *personal*, where the person hears divine service, and receives the sacrament; as was argued by my lord chief justice *Holt*. 3 W. and M. in the case of *Gumley* v. *Felsingham* †, contrary to the suggestion of *Coke* in his *commentary upon articuli cleri, cap.* 5. where he speaks of some, who would have the tithe of *corn mills* to be *personal*, as well as the *tithe of other mills*; and it hath been so adjudged in the house of lords ‡ to be a personal *tithe*, contrary to several seeming authorities and doubts in the books, viz. that tithes ought to be paid for a new *mill*, but that the same is a *personal tithe*, and so ought to be paid out of the *clear gain*, after all manner of charges and expences are deducted; and not by the 10th toll dish, as the exchequer had formerly decreed in *Newte* v. *Chamberlayne* on the 20th. Feb. 1705.

Sir *Henry Gwillim* gives *Holt's* Mss. argument before the lords in *Newte*. v. *Chamberlayn* §, who with all the other judges (except *Powell*) held, that tithes ought to be paid of a new mill, and that the tithes were personal and not predial, and ends it with these important words. "Though in their nature they are *personal*, yet "they have some resemblance to *predial*. The canon does not "oblige, unless received and submitted to. *Personal* tithes uni- "versally are required by the canon, but not due by the law of

1782. *Full* v. *Hutchins*, by which it was decreed, that the entire 10th meal of *milk* of the whole herd of cows should be set out every tenth day, both morning and evening meal at one and the same time. *Rayn.* 945. and 1010. 4 Wood. 155. and 203, and 3 *Gw.* 1200.

* *Bunb.* 73. *Dodson* v. *Oliver*, A. D. 1723 † Reported by *Shower* 281 and *Carthew* 215. 2 Inst. 671. ‡ VII. Br. P. C. p. 3. and 2 *Pr: Wms. Carlton* v. *Brightwell*. 462 A. D. 1728. § 2 *Gw.* 600.

"*England*, but only in those places, where the canon has been sub-
"mitted to." In *Gaches* v. *Haynes* * 1784 it was laid down by Lord C. Bn. *Eyre* in delivering the opinion of the court, that though the tithe of a mill were to be recovered and paid for, as a personal tithe, yet it was not strictly to be taken as a *personal tithe* in all respects; for it was *predial* as to its locality. And since that, viz: in 1797, Lord C. Baron *Mac Donald* said in *Hall* v. *Macket and others* †. "The principle, upon which the tithe of mills depends
"seems now clearly fixed in *Newte* v. *Chamberlayne* and *Gaches* v.
"*Haynes* and the other cases: it is now settled, that it is to be con-
"sidered as a *predial* tithe, so far as regards its locality, and the
"person, to whom it is payable; but in the mode of payment is
"to be treated as a *personal* tithe."

Nurseries. NURSERIES and *nursery gardens* affect a very important though new point in the doctrine of tithing, inasmuch as improvements in horticulture and refinements of luxury have brought the forced cultivation of exotics to a very extensive branch of trade. As to the young trees, the case of *Grant* v. *Hedding and Ball*, A. D. 1664 ‡, seems to have remained undisturbed: which was to the following effect. In a bill of equity for the tithes of a nursery sold; upon the hearing of the cause, divers doubts and questions were made: as, first, whether tithes should be paid, if the trees yielded no other fruit?

Secondly, whether tithes should be paid for those trees, that yield fruit, which pay tithes?

Thirdly, if some yield fruit and others not, whether or no, those that yield fruit, privilege and exempt the other that yield none, when they are sold altogether?

Fourthly, whether tithes shall be paid for them, when they are sold and transplanted within the same parish?

Fifthly, whether the vendor or vendee shall pay the tithe?

And the court was of opinion, that if the owner sell them and pull them up himself, he shall pay the tithes; but if he sell them particularly to another, the vendee shall pay the tithes; as in case of tithes of corn, if corn be standing, the vendee shall pay the tithes; but if it be sold after severance, the vendor must, *and adjourned.*

But afterwards, tithes were decreed in all such cases.

From the year 1781 to the year 1801 it was received doctrine, that pines, grapes, and other exotics forced or preserved in stoves or

* 3 *Dwll.* 1256. † 3 Anst. 917. ‡ Hard. 380.

hot-houses, and green-houses or conservatories, were titheable as well as all other vegetable productions of the natural soil and climate of the country. This was established by a very formal decree of the Court of Exchequer, in the case of Dr. Waller, vicar of Kensington *. In this cause, in the Exchequer, two questions were made, 1st, Upon the effect of a notice given for determining a composition between the vicar and the parishioners. 2dly, Whether hot and green-house plants were titheable. Upon both which points the Exchequer decreed in favour of Dr. Waller. Lord Chief Baron Eyre is reported to have said in that cause, "As to "the last objection, hot-house plants, &c. are certainly not exempt. "The like hardships occurred in wastes, madder, &c.; but an act "of parliament was necessary to exclude the right of the parson. "The general rule is clear: and the inconveniencies attending it "are not so great: and mutual inconveniencies will suggest mu-"tual moderation. If not, a court of justice cannot help it." From the decree of the Exchequer an appeal was made to the Lords, who reversed the decree of the Exchequer upon the matter of notice; but their judgment touched not the question, whether hot-house plants, &c. were titheable. The question put by the lords to the twelve judges being, Whether the notice given upon the 8th of September were sufficient to determine a composition from year to year; such year commencing on the 29th September. Mr. Justice Gould delivered the unanimous opinion . . e judges, that such a notice was by no means sufficient to determine such a contract. Upon which the decree was revers.d, without any observation having been made of the other point, as to the hot-house plants: the judgment of the lords went entirely upon the before mentioned preliminary point †.

* This case is reported under the title of *Adams* v. *Waller*, 3 Wood, 159. *Hewitt* v. *Adams*, 3 Rayn. 994. *Adams* v. *Waller*. 3 Gwil. 1204. and *Hewitt* v. *Adams and others*, in Dom. Proc. 7 Br. P. C. 64.

† The reason why the lords entered not into the consideration of the other question of hot-house plants, will appear from what Lord Mansfield said to them on this occasion, 3 Ge. 1228.

"My lords, in this case there was a composition from year to year, and that composition had continued for four, five, six or seven years. The vicar gave the appellants notice upon the 8th September, to determine that composition, as from the Michaelmas-day following, for the ensuing year, and he brings his bill for tithes in kind for that year.

"The first objection is, that he has not determined the agreement, because he has not given a reasonable notice; and if that objection is sufficient, there is an end of the cause: the bill must be dismissed: the decree must be reversed. The arguments to overrule the objection are, 'That no notice was necessary; or, if it was, that the parishioners had done something in this case, that precludes them from making that objec-

A very important case was however decided in the Court of Exchequer, which completely overset the doctrine of the Lord Chief Baron Eyre, and the other Barons, who concurred with him in the decree of 1781, which declared the forced productions of stoves and conservatories equally titheable with the natural production of the open air and ordinary soil of the country.

* *Samuel Worrall* being the impropriate rector of Clifton, in the county of Gloucester, filed his bill in the Exchequer against *Miller* and *Sweet*, nurserymen, within the parish, for the tithes in kind of all the produce of the nursery-grounds, as well for young trees and ordinary fruits and garden stuff, as for pines, grapes, and all exotics produced or brought to perfection in hot-houses and green-houses, and prayed, that he might examine the books, and that they should pay or account for whatever should be found to be due. The defendants by their answers admitted, that there had existed a composition with the rector impropriate, of 2*s.* 6*d.* in the pound upon the sale of all productions of their nursery-grounds, but not for any productions forced or preserved in buildings: that such composition was put an end to in the year 1795: that from such time they admitted the rector to be entitled to tithes in kind of all titheable matter growing on the ground (except the buildings.) They further admitted, that they produced melons, cucumbers, &c. at early seasons in frames, but not apples, pears, and other ordinary fruits: and that they sold young trees of various denominations, but kept no regular account thereof, either as to the names or appellations, or of the value and produce of each plant; but said that they had given

tion;' for they have insisted upon the construction of the agreement, (in general words it is to accept a composition from year to year without limiting any time.) They have said the true construction of that agreement is "*during his incumbency.*" There arises another objection, "If you prevail, and it is not *during the incumbency*, you have not "given sufficient notice;" then the objection is a question at law, whether reasonable notice has been given or not. And the council have been confined to that question; and they have not yet gotten to the merits of that point, which the noble lord has argued in some measure; they have not yet argued that. I am sorry your lordships cannot determine that point: I wish you could: but the objection to the payment of tithes out of all these particulars arises from the mode of cultivation; and it so happens, that on neither side have they gone into any proof of the cultivation: and at the bar they would not agree upon that point, if your lordships would have taken any argument from them. So it was impossible to go into that question. Perhaps in this particular case the incumbent may not bring another bill; perhaps others may not bring another bill; but in this state of it I will not say one word against the arguments the noble lord has used; nor will I insinuate, that I think the decree right upon that point. I think there are many objections; they all arise out of the mode of cultivation; but the preliminary point is, whether the notice is sufficient."

* *Worrall* v. *Miller and Sweet*, Decree Book, 19th Dec. 1801.

a written notice to the plaintiff Worrall to have an agent of his own in constant waiting to receive the tithe set out; but as the times and occasions of their selling such articles were uncertain, it might be necessary that their agent should attend from the rising to the setting sun. They further admitted, that they brought in and cultivated in their houses pines and other exotics, but denied that they were titheable according to the price of the sale, or at all. They averred, that when they produced early cucumbers, they set out fairly every tenth cucumber, which they cut, covered and preserved for the rector, who for a length of time neglected to attend and take them away. And when he did, he complained, that they were withered and spoiled. They affirmed the like of the melons, which they raised in frames. They also set forth in their answer, that they had fairly and regularly set out tithes in kind of all the young trees, which they sold, and other productions of their nursery-grounds, but that the rector neglecting to take them, when they were recently set out, several of them perished, and were necessarily spoiled from want of proper care and attention: and that for the purpose of doing complete justice to the rector, the defendants had given written orders to their workmen and gardeners, to set out tithes in kind of all the productions of their nursery grounds, (except of what was produced under glasses in buildings.) They insisted, that to deliver up their books would greatly hurt and inconvenience them in their trade, but they readily submitted to permit them to be inspected by any person the court should think fit to authorize. And they stated, that they had by letters and otherwise offered to the plaintiff to settle and account for all tithes in kind, (except as to the produce of hot-houses) insisting, that such productions were not in their nature titheable. The plaintiff replied: the defendants rejoined, and the cause came on to be heard on the 8th June, 1801, and was adjourned to several days. On the 15th Dec. 1801, the court decreed, That so much of the plaintiff's bill, as prayed an account of pine-apples, grapes, and other exotics raised in hot-houses, &c. should be dismissed without costs: and that the rest of the bill should be dismissed with costs, to be taxed by the deputy remembrancer. Richards and Wishaw were for the plaintiff; Plumer, Leycester, and Benyon for defendants. Thus stands the law of tithing of forced and artificial vegetable productions, as long as this last determination shall remain undisturbed *.

* *Melius est jus deficiens, quam jus incertum.* This is a notable instance of the unaccountable oscillation of modern opinions and judgments, upon the subject of tithes. We

Oak.

OAK (like *ash* and *elm*), are privileged from paying tithe, by the statute of *sylva cædua*, as timber, being of or above the growth

have the advantage of knowing from the arguments of counsel, which are reported in Dr. Waller's case, upon what principles the barons in 1781 bottomed their judgment. But having no report of the arguments of counsel, or of the opinions of the barons, in the case of *Worrall* v. *Miller and Sweet* in 1801, upon which they founded the contrary judgment, we are left to conjecture, as to the principles upon which that very solemn judgment of the Exchequer, given by Lord Chief Baron Eyre, has been over-ruled. If, however, the law be to stand by this latter determination, tithes are due for all vegetable productions, that renew or grow annually, however foreign or exotic, cultivated at extraordinary expence, and forced into premature perfection in frames; but not for such, as are brought forward to early and unseasonable maturity in hot-houses. I so far bow to principle, as readily to admit, that no case, which contravenes any known principle of law, can be law, or drawn into precedent. But I profess total incapacity to bring within any such principle the deviation of the judgment of the barons in 1801, from that of their predecessors in 1781. It is perfectly intelligible, that where a rector is entitled to the tithes of all vegetable productions, the extraordinary expence, labour and ingenuity of gardeners in forcing fruits, plants, and other vegetables into early maturity and perfection, which bring a proportionably advanced price in the market, shall not exempt the parishioners from the payment of tithes, or raise a claim *in non decimando*. If a gardener can sell a cucumber for half-a-crown at Christmas, which might be purchased for a halfpenny in July, upon what principle is the parson to be entitled to his tithes of cucumbers when they are low, and not so when they are high at market: or will he be entitled to the tenth quart of peas in June, which may cost but sixpence, and lose his right to the tenth quart of peas in January, should a gardener then force them for the market, where they might produce a guinea. The mode of cultivation may convert great into small tithes, and *vice versa*: but never shall it work an exemption from tithes, (*a non decimando.*)

But this latter determination baffles every attempt to bring it under principle. Both melons and cucumbers are foreign or exotic fruit, annually renewing or growing. Upon what principle then can the parson be entitled to their tithes, when a gardener, at extraordinary expence, with great attention and skill, sows, rears, and brings the plants to bearing in frames, 6 months before the ordinary season of fructifying in England, by means of excluding the external air and qualifying the enclosed air by the warmth and vapour of dung, and shall be deprived of the tithes of them, when he forces them into earlier maturity by producing artificial heat by means of dry fuel, tan-pits, flues, vapour, or otherwise, in stoves or hot-houses. Is the parson's right to be estimated on a scale of so many cubic inches of atmospheric air, thus adapted to quicken vegetation, by the art, labour and expence of the gardener, or by his skill in selecting, manuring, and perfecting the soil, which produces these rare, extraordinary, and early fruits. The gardener's profits must, in some measure, be proportioned to his expences and skill: but neither of them can affect the parson's right to his tenth part of the production. By every analogy of reasoning, by every case determined, by every principle of tithing, the time or season of production neither gives to, nor takes away, any right from the parson. As well might he forego his right to house lambs, or early poultry, which from care, skill and expence may be brought to market earlier, than in the ordinary season. Have the books, have the courts, has custom, has reason established any one principle, by which art, skill, labour, expence and industry, have created a difference between vegetable productions that are, and those, that are not titheable. The same species of fruit or garden stuff may be produced at different seasons, of various perfection and different prices, in common soil, in high manure, in sheltered situations, against common walls, against flue walls, under hand-glasses, in frames or hot-beds, in pits, in green-houses or conservatories, in

of *twenty years*, and though it stand till it be rotten, and unfit not only for timber, but for all manner of uses except the fire, it shall be priviledged, because it hath been once priviledged *.

Of *Easter offerings* † Bunbury has this report—"Bill by the vicar "of *Brockworth* in the county of *Gloucester* for *tithes*. It was "decreed *per totam curiam* that *Easter offerings* were due of com- "mon right, at 2*d. per* head, unless it had been customary to pay "more; that the vicar ought to have a decree accordingly, though "there was no proof of easter offerings ever having been paid "(there being a lay impropriator who is not entitled to offerings, "but *he* only, who exercises the spiritual function) and it was said "by Baron *Gilbert*, that offerings were a compensation for per- "sonal tithes ‡." Easter offerings.

Orchards do not pay *eo nomine* §, but according to their produce, for if the soil of an orchard be sown with any kind of grain, the parson shall have both tithe of the *fruit trees* and of the grain, for being of several and distinct kinds. Orchards.

Osiers are titheable, except when employed in hurdles for sheep ‖. Osiers.

Parks are not otherwise titheable of common right than by their produce. So deer, pheasants, partridges and such things, which are *feræ naturæ*, when confined in mews, &c. change not their nature. Parks.

Peas are titheable as *beans* (*ut antea* p. 121.) but if one gather *green peas* to be eaten in his house, no tithe shall be paid of them; Peas.

stoves or hot-houses: and upon what principles of the law of England, shall grapes, melons, cucumbers, or other such titheable matters, be in some of these cases titheable, in others not? The risk, pains, or expences of the parishioner, raise no claim in *non decimando*: and it is uncontrovertible, that a man who to enjoy or feed luxury will make large expenditures, can better afford to pay a tenth of his profits, than the laborious husbandman who tills the ground to produce the necessaries of life.

If by the skilful and expensive cultivation of a garden, one man shall draw a net annual profit of 200*l.* whilst another, from the ordinary, unskilful, and less costly culture of the same quantity of garden ground, shall derive a profit only of 20*l.* the consequence of this latter determination, if it be law, would go to exclude the parson in the first instance from tithes to the value of 20*l.* from the opulent nursery-man, whilst it would subject the poor labouring gardener to the payment of 4*or.* *per annum* out of his hard earned pittance of 20*l.* It certainly never was a principle of the law of England, that tithing should favour the rich and oppress the poor.

* *Halliday* v. *Let*, Mo. 541. A. D. 1598. † Bunb. 173. *Laurence* v. *Jones*, 1724. ‡ *Carthew* v. *Edwards*, 2 Gwil. 816. A. D. 1749.

§ Orchards were unknown before the time of memory as distinct from gardens. It was said in *Salway* v. *Luson*, 1 Leon. 169. A. D. 1589. that a writ of right was abated because this word *pomarium* was put in the writ. For in the Register there is no such word. The word *gardinum* comprehends it.

‖ *Watson* v. *Smyth*, 2 Keb. 634. A. D. 1670.

but if gathered for sale, or to feed hogs, they became subject to tithes *.

Pigeons. PIGEONS (vid. doves, p. 123.)

Rakings. † Where RAKINGS are of great value, or if they be left on the land covinously, tithes shall be paid of them; but if left in a small quantity, and involuntarily, it is otherwise; and therefore the words of the suggestion in such case are *minus voluntarie*.

Rape-seed. RAPE-SEED is a *small tithe*, which is generally compounded for at so much per acre. I find no determination upon the mode of taking it in kind.

Saffron. SAFFRON is a *predial small tithe*; but I find no case upon the mode of taking it in kind ‡.

Salt. SALT is only titheable by custom §.

Tares. TARES whether cut *green* or *ripe*, are a great tithe, and belong to the rector ‖; if given to cattle of husbandry, not subject to tithe, as the court seemed to think ¶.

Tile. TILE is not titheable, being of the substance of the earth **.

Timber. TIMBER TREES, above *twenty years* growth, when cut and corded for fuel, and the bark stripped from the same, adjudged to pay tithes, as well as underwood; but that no tithe was due for such wood, above *twenty years growth*, nor of the bark thereof which was not corded ††.

Turf. TURF is *tithe free* as part of the freehold ‡‡.

Turkies. TURKIES were holden by Sir *Joseph Jekill* to be as tame as hens or other poultry, and therefore must pay tithes. And also, that if tithes be *once* paid of *eggs*, there can be no demand made a *second time* in respect of the *chicken* hatched afterwards §§.

Turnips. Of *Turnips* sown after the corn is cleared, and fed with sheep and barren cattle, tithe shall be paid. Though insisted upon, that the soil in that county (Staffordshire) was *dry* and *sandy*, and that this method of husbandry improved the land, so that the parson had *uberiores decimas* of *corn*, and had received the tithe of *lambs* and *wool* of the *sheep* so fed before; but the court overruled this

* 1 Rol. Ab. 647. † *Andrews* v. *Lane*, MS. of *Bridgeman*, 2 Gw. 471. A. D. 1633. ‡ *Bedingfield* v. *Feate*, Cro. El. 467. A. D. 1596. § Godolph. 438. ‖ *Hodgson* v. *Smith*, 2 Wood, 21. A. D. 1715. and *Steers* v. *Brooner*, 2 Wood, 373. A. D. 1736. ¶ *Hayes* v. *Dowse*, Bunb. 279. *Perry* v. *Saint*, Cro. El. 139. A. D. 1589. is rather against it. ** 2 Inst. 652.

†† *Greenaway* v. *Earl of Kent*, Bunb. 98. 1721, which refers to other decrees to the like effect, viz. *Buckle* v. *Vincent*, 1692, where it was said, that it was not the age but the use of the tree, that privileged. The same decreed in *Acton* v. *Smith*, both reheard and reviewed; *Franklyn* v. *Jones*, in 1684, and *Gulpeper* v. *Layfield*.

‡‡ 2 Inst. 651. §§ 2 P. Williams, *Carlton* v. *Brightwell*, ut antea, 462.

defence, and said it amounted to a *non decimando* *. The tithe is payable by the owner of the land, not of the beasts †, and must be set out in heaps, where the quantity will admit it ‡.

By statute 2 Edw. 6, c. 13, sec. 3. the tithe of cattle feeding on large wastes, where the parish is uncertain, shall pay tithe to the incumbent of that parish, in which the owner of the cattle dwells, unless limited, otherwise by *custom* or *prescription* §. The statute gave not the tithe, which was payable *communi jure*, but only ascertained, by whom it should be payable. Cattle feeding on commons of uncertain boundaries.

WILLOWS are not titheable if growing about a house, though it be waste to fell them, yet being felled, tithe shall be paid of them ‖. Willows.

WOAD growing in the nature of an *herb* the tithe thereof is a small tithe, and titheable *de jure*, and to be set out in baskets both at first and second cutting ¶. Woad.

WAX (vide *honey*, p. 125.) Wax.

WOOD, *vide* the different trees before mentioned. Wood.

Of *wood* much has already been said. *Bunbury* in reporting the case of *Jordan* v. *Colley* and others **, which was a bill by the rector for tithe wood as *de jure* titheable, said. "Though the defendants "were decreed to account, I do not find, that it is yet certainly de- "termined, that tithe wood is due *de communi jure*:" There is scarcely one branch of tithes on which the books seem to be more contrariant, than this of tithe wood. In contradiction to many cases before mentioned or referred to, as well as to many others of the like tendency, the opinion of Lord Hardwicke, who decided nothing hastily or unadvisedly, in *Walton* v. *Tryon* †† was, that lops and tops of ancient pollard, oaks and ash are exempt from tithes: and that it is not the use, but the age and quality of the trees, which determine the right to tithes. Wood cut at stated periods v. g. every 10 years for the purposes of husbandry shall pay tithes *de jure* ‡‡. And tithe wood set out, ought to be stacked and fagotted §§.

All *wool* ‖‖, as a thing yearly renewing is titheable *de communi* Wool.

* *Swinfen* v. *Digby*, Bunb. 314. A. D. 1731. † 3 Gwil. 859, 1756, MS. *Kinlesw* v. *Isles*. ‡ *Beaumont* v. *Sblicock*, 3 Gwil. 945. 1768. § Vid. App. No. VI. ‖ *Guffy* v. *Pindar*, Hob. 219. A. D. 1616. ¶ *Anderson* v. *Lane*, 1633. MS. *Bridgeman*, 2 Gwil. 473. ** Bunb. 61. A. D. 1720. †† Amb. 150. and 2 Gwil. 827. A. D. 1751. ‡‡ *Smith* v. *Williams*. 2 Gwil. 608. A. D. 1730. §§ *Brabourne* v. *Eyres*, 1 Wood, 127. A. D. 1672, which seems to be questioned by the case of *Brew* v. *Drewe*, 1729, 2 Gwil. 700. from MS. ‖‖ *Listet* v. *Fox*, 1 Wood, 422. A. D. 1703. *Baker and Al.* v. *Sweet*, Bunb. 90. A. D. 1741.

jure. Even hog-wool, or the wool of a sheep one year old; even wool-locks and flocks of wool, after the wool is made, are titheable, if there be more than ordinary left out, otherwise not. Notwithstanding the former doctrine of apportioning the tithe of *wool*, according to the time the sheep may agist, in several parishes, the law now is settled, that the whole tithe of wool shall be paid to the rector or vicar of the parish, in which the sheep are shorn, and it is payable, when the sheep are shorn *. From the overruling of a customary manner of paying tithe-wool, and delivering the *tenth part* without fraud to the vicar, *without sight and touch*, on the authority of *Wilson* v. *Bishop of Carlisle*, Hob. 107. it appears, that wool ought to be set out in bales or heaps, in *sight and within touch* of the other nine parts, of which the parson may judge of the fairness of his tithe by his own senses, from weight, quality, and measure †.

Such, summarily, is the *common law* of tithing. The alterations and variances from the common law either generally by statute, or particularly by special prescription are next to be considered.

* *Bateman* v. *Aistroppe*, 2 Rayn. 670. † *Christian* v. *Wren*, Bunb. 321. A. D. 1732.

BOOK II.—CHAP. III.

Of Tithes in England, as affected by Statute Law.

Common law only altered by statute.

AS the common law of England can have been in no instance altered, abrogated or affected, since the time of memory (A. D. 1189) but by statute law, all decisions of the judges, however apparently contrariant, are but declarations of what the common law is, or how it has been altered or affected by statute law: and the construction of statutes rests with the judges of the different temporal courts of record. It would be redundant to attempt to enforce by reasoning, individual submission to the acts of the legislature *, in whom under God the supremacy of that *civil*

* In this spirit was it truly said by *Plowden*, in the case of the *Earl of Leicester* v. *Haydon*, 398. *Le Court de Parliament est de tres grand honor et justice, de que nul home doit imaginer chose dishonorable.* Lord Coke, 5 Inst. 342. referring to the answer of Pope *Eleutherius*, A. D. 169. written to him by our king, Lucius, and his *proceres*, (they, I presume, like our lords and commons, together with the king at present, completed the supreme legislative power of that day) who upon their first conver-

power, to which Englishmen owe submission, is vested. Separate negatives are not to be raised against the will of the majority, which is that of the whole.

The old canon law is a part of the common law.

It will be proper here to observe, that the old *canon* law, to which frequent reference is made, is a part of the *common* law of England and therefore binds the whole nation: but the later canons of 1603, bind only the clergy and not the laity. Every part therefore of the old *canon* law, which bears upon any object within the competency of the *civil magistrate* (such is by far the greatest part of that huge mass) became incorporated with our municipal or common law, by adoption of the nation, and according to Sir M. Hale, (one of our most constitutional law writers) * "their "authority is founded merely on their being admitted and received "by us, which alone gives them their authoritative essence and qua-"lifies their obligation; we are not bounden by their decrees fur-"ther or otherwise, than as the kingdom here has, as it were, "transposed the same into the common and municipal laws of "the realm, by admission, acquiescence, or express declaration, "which alone can make them of any force in England. I need "not give particular instances: the truth thereof is plain and evi-"dent, and we need go no further, than the statutes of the 24 "Hen. VIII. c. 12. 25 Hen. VIII. c. 19, 20, 21, and the "learned notes of Selden upon *Fleta* and the records there cited."

Binding force of the canon law.

The nature and binding quality of the *canon* law is very explicitly set forth by Lord Hardwick when chief justice of the king's bench, A. D. 1737, in the case of *Middleton and Ux* v. *Croft* †. "One point in this cause is, whether the makers of the canons of "1603, had a power to bind the laity? They were made by the "bishops and clergy in convocation assembled by virtue of the "king's writ, and confirmed by his charter under the great seal; but "the defect objected to them is, that they were never confirmed by "parliament, and for this reason though they bind the clergy of the "realm, yet they cannot bind the laity for want of a parliamentary "confirmation. And some of the council in their argument

ans to christianity wished to have the Roman civil law sent to them, which Eleutherus very wisely discouraged, as the adoption of christianity would make no difference in their municipal code or constitution: he tells them therefore, *habetis penes vos in regno strumque jugitum*: that is, you have the law of the gospel and your own civil constitution: make them accord as you think fit. You are supreme: accountable neither to me nor to any earthly power for what you shall do herein. *Vicarius vos Dei estis in regno. You are the vicar of God in your kingdom.* In other words, The supremacy of civil or temporal power rests with you.

* Sir M. Hale's History of the Common Law, c. 2. † 2 Strange, 1056.

"seemed to admit it, by putting the case upon the foot of the "ancient *canon* law; but as the other council, who argued on that "side did not give it up, it is become necessary to examine and "determine a point of so great moment to the constitution of "England, in order to settle the law thereupon. And on the "best consideration we have been able to give it, we are all of "opinion, that *proprio vigore*, the canons of 1603 do not bind the "laity; I say *proprio vigore*, because some of them are only "declaratory of the ancient *canon law*. They, who look into "*Spelman's* collections, will find much matter in the ancient "councils, that may serve for illustration and ornament; but as "those were often mixed assemblies, composed partly of clergy, "and partly of laymen, sometimes the king with his nobility, at "other times some of the commons likewise, are mentioned as "present. But whether they had suffrages in these councils or not, "and in what manner they were sent thither, whether by election or "by what other kind of constitution, is very uncertain and obscure. "The like may be said of several councils held in the earliest times "following the coming in of the Norman line, and afterwards there "is a frequent mixture of the legatine authority, which arose "merely by papal usurpation.

The canons of 1603 bind only the clergy.

"Upon this important question therefore, it is proper for judges to proceed upon surer foundations; which are the general "nature and fundamental principles of our constitution, acts of "parliament, and resolutions and judicial opinions in our books; "and from these to draw our conclusions.

"No new law can be made to bind the whole people of this "land, but by the king, with the advice and consent of both houses "of parliament, and by their united authority. Neither the king "alone, nor the king with the concurrence of any particular num- "ber or order of men, hath this high power. The binding force "of these acts of parliament arises from that prerogative, which is "in the king our sovereign liege lord; from that personal right, "which is inherent in the peers and lords of parliament to bind "themselves and their heirs and successors in their honours and "dignities; and from the delegated power vested in the commons as "representatives of the people; by reason of this representation, "every man is said to be party to, and the consent of every sub- "ject is included in an act of parliament.

Whence our statute laws are binding.

"But in canons made in convocation, and confirmed by the "crown only, all these requisites are wanting, except the royal "assent; there is no intervention of the peers of the realm, nor any

Canons made in convocation have only the royal assent.

"representation of the commons. It was said indeed by some of the "civilians in this cause, that, even in parliament, there is not an "actual representation of all orders and degrees of men, there be- "ing more subjects, who do not vote in elections, than who do. "But that doth not make it cease to be a representation. It was "impossible, that all could join in the election; and therefore our "constitution hath fixed it in those, who are possessed of the most "valuable and fixed sort of property. A notion also was advanced "in this argument, that the parson represents the parish: but how "can that be, when we all know, that the parson is not elected by "them? The writ is, to summon to convocation the whole *cler-* "*gy*; and the præmonition is, that archdeacons and deans shall "come in person, and the rest by their representatives. These "shew plainly, that the clergy only are called, and that the proc- "tors are chosen to represent the clergy only. Hence arises the "distinction between canons made in ancient councils confirmed "by the empire after it became christian, and those made here. "The emperor according to *Justinian* and the Digest, had a le- "gislative power; and when they received his confirmation, they "had their full authority. But that is not the case here: the "crown hath not the full legislative power; and it is therefore "rightly said in 2 *Salk.* 673, that the king's consent to a canon "*in re ecclesiasticâ*, makes it a law to bind the clergy, but not the "laity: and no one can say, that the consent of the people is in- "cluded in the royal confirmation. Another argument is, that by "our constitution the power of imposing taxes is co-extensive with "the power of making new laws. The parliament lays taxes "upon all the people; but the clergy never pretended to tax any "but themselves. And it seems almost an absurdity to say, that "when the clergy in convocation cannot charge the laity with one "farthing by way of tax or imposition, cannot even create a new "fee to be paid by them, yet that the clergy should have it in their "power to enact new laws, for disobeying which, the laity shall "incur the penalty of excommunication, which is to be carried "into execution by the loss of their liberty, and a disability to sue "for, and dispose of their personal estates. This would certain- "ly be to affect the laity in their property in a very high degree; "and yet it is admitted, that the clergy by synodical acts cannot "charge the property of the laity.

sent, which suffices not to make law.

Convocation what.

"In all the acts of parliament since the Reformation, for con- "firming forms of prayer and other ecclesiastical constitutions, "the preambles shew, that the clergy in convocation were only

Objects of legislative power.

"considered as the proper assembly to prepare and propound them, "but not to enact or give them their force. It was objected in- "deed in this argument, that the confirmation by parliament did "not give being to them as laws, to bind the laity; but was de- "signed merely to inforce them by the addition of temporal pe- "nalties. But that is not the only reason, though it is one. The "true use of these confirmations in parliament was, the extension "of such constitutions over the laity, who would otherwise not be "bound. It hath also been said, that at least they should bind the "laity *in re ecclesiasticâ*.—But this proves a great deal too much; "there are many things of an ecclesiastical nature, which no ca- "non can touch, as the case of tithes, the degrees of consanguinity, "and the operation of the administrations; and if this argument "would hold, they might overturn the common law as to the "heirship of lands, and the division of personal estates; which "would never be endured; for these are matters which have al- "ways been regulated by the legislature." And after considering the cases, which had been alleged on both sides, he concludes upon the whole, and lays it down as the deliberate resolution of the whole court, that the canons of 1603 do not *propriâ vigore* bind the laity.

There are many particulars in those canons, which are taken from the ancient *canon law* received here before the said statute of the 25 H. VIII.

Tithes always considered objects of the civil power.

Nothing can so conclusively demonstrate, that tithes are objects of the *civil power*, and were always so considered in this country, as the uniform application to parliament by our ancestors to explain, alter, modify, abrogate, or repeal the payment of them on every occasion of doubt, difficulty, or inconveniency arising out of the system.

Statute of *Circumspectè Agatis*.

The first of our statutes, which mentions any thing specifically of tithes, is the statute of *Circumspectè Agatis*, A. D. 1285 *. It is addressed in form of a monition to the common law judges, not to punish the Bishop of Norwich and his clergy, (*Plowden* † says, that the Bishop of Norwich is only put for example, for the statute extends to all the bishops) for holding pleas in the spiritual courts of certain matters therein enumerated, and supposed to be *mere spiritualia*: amongst which spiritual matters, according to Lord Coke's reading of that statute ‡, is the following specifica-

* 13 Edw. I. stat. 4. vide Appendix, No. VII. † Plowden's Com. 36.

‡ This reading varies from that given in Ruffhead's edition of the Statutes from the Cotton MSS. *Item si rector petat decimam majorem vel minorem dummodò non petatur quarta pars ecclesiæ.*

tion of some spiritual matter. *Item si rector petat versus parochianos oblationes et decimas debitas vel consuetas, vel si rector agat contra rectorem de decimis majoribus vel minoribus dummodò non petatur quarta pars valoris ecclesiæ.* Also, if a rector demand of his parishioners oblations and tithes due and accustomed, or if one rector sue against another rector for great or small tithes, so that the fourth part of the value of the living be not demanded. So that the act whether new or declaratory, gives to, or recognizes in the bishops, the right of holding pleas in court christian, of parsons against their parishioners, for the subtraction of tithes. The consideration of the several jurisdictions of different courts in enforcing payment of tithes, will orderly come into future discussion. I shall in the mean time offer to the reader what Lord Coke has said upon this part of the statute*. "True it is, that of ancient time the parsons did sue for substraction of tithes in court christian; but if the right of tithes had come in question, it should have been tried by the common law: and therefore in *libro rubro interleges Hen.* I. speaking of pursuit for tithes in court christian, it is said, *si rex patiatur*; but at this day it is without question, as hath been said, that for substraction of tithes the conusans, by force of divers acts of parliament, doth belong to the ecclesiastical court. And by this act *modus decimandi*, real composition, or by prescription, or custom is established: for hereby are tithes divided into two parts, in *decimas debitas*, and that is *quota pars*, the tenth part, and into *decimas consuetas*, and that is a duty personal due by custom and usage to the parson, &c. in satisfaction of tithes, as a yearly sum of money or other duty: and these are here called *decimæ consuetæ*, and for this *modus decimandi*, the parson, &c. may sue in *court christian*, and is warranted by this act.

Lord Coke's comment on this statute.

"There is also real satisfaction for tithes: as if of ancient time land hath been given by the consent of the patron and ordinary to the parson and his successors in satisfaction of tithes out of other lands, this is also a good discharge of tithes, but for this or the like real satisfaction he cannot sue in court christian, but at the common law: Of this real satisfaction you may read a notable record in 25 H. 3, which was before the making of this act, and the effect thereof was, that one *Samson Folliot* brought a prohibition against the parson of Swindon for suing him in the court christian for substraction of tithes of hay, averring, that his

Folliot v. Parson of Swindon.

* 2 Inst. 489.

"ancestors had given to the parson of Swindon 2 acres of meadow "land in lieu of tithe hay in such a parish, and judgment was "therefore given for the plaintiff in prohibition, which shews, "that the question of right to tithe was originally determinable by "the *common law court* and not by the *ecclesiastical court.*" With "reference to the restrictive words *dummodò non petatur quarta "pars*, Lord Coke further says, 'so as at this day in case when one "person of the presentation of one patron demands tithes against "another person of the presentation of another patron in *court "christian*, amounting to a fourth part, &c. the right of tithes at "this day is to be tried at the common law.'

Right to tithes originally determinable in common law court.

Articuli Cleri.

The next statute in chronological order, which affected tithes, was that which passed in the 9th Edw. II. A. D. 1315, known under the title of *Articuli Cleri*. Suffice it here to observe on the authority of Lord Coke*, that about the year 1258 (42 Hen. II.) "Boniface Archbishop of Canterbury, uncle of Eleanor Queen of "England, made divers canons and constitutions provincial di- "rectly against the laws of the realm, which were productive of "controversies between the judges of the realm and the bishops; for "this caused ecclesiastical judges to usurp and incroach upon the "common law. But notwithstanding the greatness of the arch- "bishop Boniface, and that divers of the judges of the realm were "of the clergy; and all the great officers of the realm, as chan- "cellor, treasurer, privy seal, &c. were prelates; yet the judges pro- "ceeded according to the laws of the realm, and still kept, though "with great difficulty, the ecclesiastical courts within their just "and proper limits. The courts by pretext of these canons be- "ing at variance, at length at a parliament holden in the 51st year of "Henry the third, *Boniface*, and the rest of the clergy complain- "ed (which was *ultimum refugium*, and yet the right way) and ex- "hibited many articles as grievances, called *articuli cleri*. The "articles exhibited by the clergy either by accident or industry are "not to be found; some of the answers are extant. Nothing "however was conclusively done herein, notwithstanding several "intermediate applications to parliament, until the parliament "holden at Lincoln in the ninth year of Edw. II. where *Walter "Reynolds*, Archbishop of Canterbury †, in the name of himself "and of the clergy, peferred 16 articles, and by authority of par-

* 2 Inst. 599.

† Mat. Paris observes, that this prelate was highly favoured by the king, and ob- tained these equitable answers to the requests of the clergy. *Regi gratiosissimus fuit: hæc regis æquissima responsa ad prælatorum petita obtinuit*, fo. 220.

"liament had the answers therein contained, made *seriatim* to "every one of them."

Out of the 16 chapters of the *Articuli Cleri* three of them only affect tithes *. Articuli Cleri.

By the first chapter it is answered, that no prohibition shall be granted in suits for tithes, &c. although on account of the long detention of them *it become necessary to assess the damages in money* †. But if a clerk or religious man should have sold his tithes for money, and then sued the vendee for the purchase money before the spiritual judge, there a prohibition should go, because by the sale the spiritual goods were made temporal and the tithes turned into chattels. Prohibition where tithes converted into chattels.

The second chapter enacts, that if a question be made of the right to tithes, arising out of the right to the patronage, and the quantity of the tithe exceed one fourth of the living, a prohibition should go, if this matter were brought before the ecclesiastical judge. Also where the suit on the right to tithes exceeds one fourth of the living.

The fifth chapter enacts, that no prohibition shall go, if the parson demand tithe of a new mill ‡. No prohibition if parson demand tithes of a new mill.

Whoever wishes to see more of the effects of this statute, and of the different opinions of the ecclesiastical and temporal judges upon the subject will find in Lord Coke §, a very minute and interesting account of certain articles which "*Richard Bancroft* "Archbishop of Canterbury exhibited in the name of the whole "clergy in Michaelmas term, anno 3 *Jac. Regis*, to the lords of "the privy council against the judges of the realm, intitled, cer-"tain articles of abuses, which are desired to be reformed, in grant-"ing of prohibitions, and the answers thereunto, upon mature "deliberation and consideration, in Easter term following, by all "the judges of England, and the Barons of the Exchequer; Differences between spiritual and temporal judges, 3 Jac. I.

* Which chapters see in the Appendix, No. VIII.

† Conceiving this to be the genuine meaning of the act, I have varied from the translation given by Ruffhead; which is, *although for the long withholding of the same the money may be estimated at a certain sum.* Vide 1 Ruffhead, 167. the words are, *Si propter detentionem istorum dilatarum, ad estimationem earum dem pecuniarium veniatur.*

‡ The stile of this chapter is very pointed, and seems calculated to counteract the effect of some then recent determinations of the temporal judges, in granting prohibitions tempory from the rights of the clergy. It gives the form of the prohibition in such case, viz. *Because tithes have not been heretofore paid for such mill, we prohibit*, &c. *and if on this occasion you have published any sentence of excommunication, that you absolutely revoke it. And it then pledges the royal faith, as an amende honorable to the clergy, that the king never had assented to any such prohibition; and vows it would ever do in such cases.* § 2 Inst. p. 601.

" with one unanimous consent under their hands, (resolutions of " highest authorities in law,) which were delivered to the lords of " the council." Some part of the judges' answers to the clerical objections, which concerns tithes, will find a place in the last book, which treats of the remedies for enforcing payment of tithes.

Act of Edw. III. against the Chancery's issuing *scire facias* for tithes.

The next statute in order of time, which affected tithes, was *the* 18*th Edw.* III. *St.* 3. *c.* 7. *, by which it was enacted that whereas writs of *scire facias* had been granted to warn prelates, religious and other clerks, to answer *Dismes* in Chancery, that such writs from thenceforth should not be granted, and that the process hanging upon such writs should be annulled and repealed, and that the parties should be dismissed from the secular judges of such manner of pleas, with a saving of the rights of the crown †. The effects of this statute will be more orderly hereafter considered in treating of the remedies for enforcing the payment of tithes.

Statute of *Sylva Cædua.*

The short statute of *Sylva Cædua*, 45 Edw. III. c. 3. A. D. 1371 ‡, stands next in order, which was made on the petition of the laity and enacted, that a prohibition should be granted, where a suit was commenced in the spiritual court for *Sylva cædua*. And of this statute Lord Coke thus speaks §, " The bishops, and " others of the clergy taking upon them to interpret this statute, " which belonged not unto them, gave out and published, that this " ordinance did not restrain their ancient jurisdiction, and that

* Vide Appendix, No. IX.

† 2 Inst. 639. " Before we enter into the exposition of this act, we will clear it of " an objection against the life of it, viz. That it should be no act of parliament, but an " ordinance made by the king only at the request of the prelates: and that the king to " these letters had put his seal, and *teste*, and date, as done by the king only: all which, " say they, appear in the parliament roll, and that the clause of *En testimoniance de quel* " *chose*, &c. is left out of the print.

" But hereunto we answer, that by the said clause *En testimoniance de quel*, &c. is to " be understood, that this act was so plausible to the prelates, that they requested the " king, that it might be exemplified under the great seal for the better preservation there- " of, which the king granted. This parliament began the Monday after the *Octab. Tri-* " *nitatis*, which was 16 *Junii*; and this exemplification was 8 *Julii*, after this act was " passed, there being but seven acts passed at this parliament. And *En testimoniance* " *de quel*, and the whole clause following, are words of an exemplification.

" Now that this ordinance before the clause of the exemplification is an act of parlia- " ment, first, is proved by divers reasons, viz. The title of the parliament is *Incipit* " *statutum Regis Edwardi anno regni sui decimo octavo*. Secondly, it is entered in " the parliament roll. Thirdly, it was by force of the king's writ, (as the usage then " was,) proclaimed as an act of parliament. And F. N. B. 30. E. taketh it for a statute; " and so it hath ever been by the general consent from time to time of learned men."

‡ Vide Appendix, No. X. § 2 Inst. 643.

"this ordinance was never affirmed for a statute: and thereupon "the subject was still vexed in *court Christian*, both contrary to "the common law, and the said statute: and thereupon a bill was "exhibited in the next parliament following, holden in the 47th "year of Edw. III. reciting the statute of 45 Edw. III. and then "shewing, that the persons of holy church intending, that this "ordinance did not restrain their ancient incroachments; and sur-"mising, that this was not affirmed for a statute, held plea in "court Christian to the contrary of the ordinance aforesaid, to the "great damage of the people. Wherefore may it please our so-"vereign lord the king to affirm the said ordinance for a statute "to indure for all times to come; and that a special prohibition "upon the same statute thereupon be made in the chancery, pro-"hibiting, that they should not hold plea in court Christian of "tithes of wood of the age aforesaid. Whereunto the answer "was; that such prohibition be granted, as hath been used of an-"cient time which answer being compared with the conclusion of "the act of 45 Edw. III. hath given such an end to both these "points, as no question hath been made thereof at any time since. "And to say the truth, that the surmise, that this act of 45 Ed. III. "was but an ordinance, and no statute, was but a meer cavil, "without any colour of probability. For 1st. It is entered in the "parliament roll amongst the other statutes made at that parlia-"ment. 2d. It is under the title in that roll of statute. Edw. III. "*Anno Regni sui* 45. 3d. It was proclaimed by the sheriffs (as the "usage in those days was) amongst the rest of the statutes of that "parliament. 4th. It hath the phrase of an act of parliament, "(ordeine est et establie) agreeing therein in effect with the other "acts in that parliament. 5th. It hath the consent of the lords "and the commons (who join in the petition in the preamble) "and of the king." There appear on the rolls of parliament several petitions * from the clergy concerning the prohibitions issued under the statute of the *Sylva cædua* †, which was always disrelish-ed by the clergy: to some of which no answers appear to have been given, and as to the others, the answers refer the petitioners to the usage of the common law, which could not be unknown, as the statute of *Sylva cædua* was a declaratory act.

Lord Coke's proofs against the surmise of the clergy that this was a *statute*.

* See the several of them in Appendix, No. XI.

† The modern doctrine, (if it may be allowed the phrase,) of *Sylva cædua*, is best collected from the case *Wallis* v. *Wynn*, before mentioned, reported from MSS. both by Raymond and Lutwich. Owen 127.

By 1 Ric. II. pursuit for tithes acknowledged of right to belong to the spiritual courts.

The 1st Rich. II. c. 13. (A. D. 1377,) * recites, that † pursuit for tithes of right ought and of ancient time did belong to the spiritual court ‡: but that ecclesiastical judges were for this cause unduly and maliciously indicted, imprisoned, and by secular power horribly oppressed, &c. It provides remedy, by subjecting the procurers of such indictments to the same pains as the procurers of false appeals by the statute of Westm. 11. (viz. one year's imprisonment).

The 14th chapter of the same act of the first year of Richard II. § provides also, that where a clergyman was impleaded in the temporal courts for his own tithes taken under the name of *goods taken away*: and he excepted or alledged, that the substance of the suit was for tithes due to him of right and of possession to his church, or to any other of his livings; the general averment should not be taken without specially proving how the same was his lay chattel.

Clergy petition parliament against the statute de Sylva Cædua.

Several petitions ‖ were in the mean time made by the clergy to parliament concerning *Sylva cædua*, to which no other answers were made, than by referring them to the old law.

15 Ric. II. allowances by appropriators to vicars and poor.

In the year 1391, the legislature from the practice of appropriating livings, (although all appropriators were then clerical) found it requisite to check the abuse, by obliging the appropriators to cede a competent part of the livings to the poor and to the vicar, both of which till then depended upon the arbitrary discretion of the appropriator, 15 Rich. II. c. 6 ¶.

2 Hen. IV. Premunire for applying to Rome for dispensation from payment of tithes.

In the year 1400, the legislature finding, that the influence, or power, which the nation had allowed to the *pope* over tithes and other church property came to be abused, by exempting from or dispensing with the payment of tithes in certain cases to the parsons, to whom by law they were made payable, found it requisite by 2 Hen. IV. c. 4 **. to prohibit as well the *Cistertian* (or *Bernardine*) monks, of whom in particular the complaints were made to parliament, as all others from executing or obtaining such bulls for discharging their lands letten out (lands in their own hands never paid tithes, for *ecclæsia non solvit ecclesiæ*) from payment of tithes under the severe pains and forfeitures of a *præmunire*. These were to be put out of the king's protection, to forfeit their lands and

* Appendix, No. XII. † 2 Inst. 489. ‡ This, said Lord *Coke*, must be intended by former acts of parliament, (already mentioned.) § Vide Appendix, No. XIII. ‖ See them in the Appendix No. XIV. ¶ Appendix, No. XV. ** Vid. the Act, Appendix, No. XVI.

goods, and be imprisoned, and ransomed at the king's pleasure, and if the offenders were not to be found, they were outlawed.

Commons petition against agistment tithe and referred to the law.

In the next year * the commons prayed, that the clergy should be prohibited from demanding agistment tithe of lands sown and meadow the same year, in which they had received tithe of corn and hay and of pastures and wastes (which they stated to have been at no time titheable for agistment) off which they took tithes of lambs, calves, &c. The answer however negatived the law, on which the commons presumed, "*Let him who shall find himself "aggrieved, sue specially.*"

4 Hen. IV. Religious appropriation prohibited.

A. D. 1402, the parliament became alarmed at the growing influence of the religious; to check which, they confirmed by the 4th Hen. IV. c. 12 †. the 15 Richard II. c. 6. touching appropriations. They annulled any, that might since have been made by the king, (except the appropriation of Hadenham to the archdeacon of *Ely*, which they confirmed) and thenceforth required, that *secular* priests only, and not *religious* men should be ordained vicars perpetual, to be *canonically instituted* (that is *toties quoties* a change should happen) *and inducted and canonically endowed* by the discretion of the *ordinary*. The statute also specifies the particular intent, with which the legislature consented to such appropriations, and found it necessary to endow vicars; viz. that they should do divine service, instruct the people, and keep hospitality.

5 Hen. IV. Lands of aliens liable to tithes even in king's hands.

In the year 1403, 5th Hen. IV. c. 11 ‡. was passed an act, that seems redundant tenderness to the rights of the church, viz. that the tenants of any lands of aliens, should continue to pay tithes to their parsons, even after the lands should have been seised into the king's hands, and notwithstanding any prohibition to the contrary.

Frequent petitions to parliament concerning tithes.

From this time to the reformation we find no other statute affecting tithes; though several petitions § appear on the rolls of parliament, *de Sylva cædua*, prohibitions, inofficiate vicarages and other abuses of appropriations, to which no conclusive or determinate answers were returned. From which it appears, that though there existed in those times constant jealousies and differences between the clergy and laity respecting tithes, yet parliament referred the petitioners uniformly to the existing laws. The age of reformation let in a new spirit respecting church property, and the

* Vide Appendix, No. XVII. † Appendix, No. XVIII. ‡ Vide Appendix, No. XIX. § See them in the Appendix, No. XX.

great statute alterations of the tithe laws are to be dated from that epoch.

26 H. VIII. First act of reformation touching the civil establishment of religion.

The 26th of Hen. VIII. c. 3*. was the first act of that monarch, which touched *the civil* establishment of religion in England by transferring the payment of the first fruits or tenths of every benefice or promotion spiritual from the *pope* to the king. It is a very special act, consisting of 30 sections and provides for all contingencies likely to arise from so substantial a change introduced into the application of the mortmain fund.

Seventh section of that act keeps untouched the real spiritual jurisdiction.

The seventh section declared expressly, that notwithstanding this transfer of the first fruits from the pope to the monarch, it was not the intent of the act to touch or encroach upon the real *spiritual power*; which the legislature assumed to be *divinitus commissa*: therefore enacted that *all archbishops and bishops, and all others having ordinary jurisdiction might give and deliver letters of institution and induction, as they might have done before the passing of that act.*

27 H. VIII. For ensuring payment of tithes.

In the very next year, from the contempt and disregard, into which the ecclesiastical courts appear then to have fallen, and from other causes, the legislature found it requisite to pass an act *for confirming and enforcing the due payment of tithes according to the custom of each parish.* Accordingly the 27th Hen. VIII. c. 20†. reciting the abuse then prevailing, and complained of, enacted, that tithes should be paid according to the custom of the parish, where they were due, and the offender, in substracting of tithes, should be convented before the ordinary, or the person having competent jurisdiction, who in case of any contempt, contumacy, disobedience, or other misdemeanour of the party defendant, might make information and request to any of the king's most honourable council, or to the justices of the peace of the shire, where such offender dwelt, to assist and aid the said ordinary, &c. to order or reform any such person in any cause before rehearsed; that then the offender should be bounden by two justices of peace, &c. to obey the ordinary's sentence with an exception of the citizens of London. The act provided, that every person should have his demand and defence according to the laws ecclesiastical. The act was only to operate for such time until the king and his 32 ecclesiastical commissioners should have affirmed and ratified the new *ecclesiastical* laws of the church of England. As these commissioners never made any such ecclesiastical laws, the statute is still operative‡. It is also confirmed by the 2d Edw. VI. which shall be noticed hereafter.

* Vid. Appen. No. XXI. † Vid. the act, Appen. No. XXII. ‡ Watts. 578.

By the * 27th of Hen. VIII. c. 28. A. D. 1535, all monasteries throughout England †, which had not in lands a clear yearly rent of 200*l.* were vested in the king in fee simple; and it is to be remarked, that the act added a singular proviso to the limitation in fee, which although it did not qualify the fee simple in law, seems to have been calculated to soften the minds of the clergy and others, who were likely to be irritated at this strong measure of the civil power: and is in fact nothing more than a redundant declaration of the trust ‡ upon which alone the *civil magistrate* could resume this portion of the *ecclesiastical* or *mortmain property*: viz. unto the king's majesty and his *heirs and successors for ever, to do and use therewith at his and their own wills to the pleasure of Almighty God and to the honour and profit of this realm* §.

27 H. VIII. Dissolution of smaller monasteries.

The 2d. section of this act is of very extensive importance in tithe causes, and must be specially noticed. But in as much as it is closely connected with the next statute, which very materially also affects tithes viz. 31 Hen. VIII. c. 13. A. D. 1539 ‖, it will be proper to reserve all observations upon the former statute, till the latter be set forth. This is intituled *An Act for the Dissolution of Monasteries and Abbies.* It recites, that divers abbots and other persons of religious houses had since the 4th Feb. 1535, *(freely)* given or surrendered to the king in fee simple their several monasteries, lands, and hereditaments, and then vests them and all others thereafter to be surrendered or conveyed or to come by any means to the king, in his majesty, his heirs and successors for ever. The 21st section by perpetuating the exemption from tithes to such lands, as were discharged therefrom before the dissolution, introduced a very material alteration into the principles and law of tithing; which will be more particularly noticed hereafter.

31 H. VIII. Act for dissolution of monasteries and abbeys.

An intermediate act of the legislature ought not to pass unnoticed, which was made in the 28th Hen. VIII. c. 11. A. D. 1536 ¶, for the restitution of the first fruits in time of vacation, to the next incumbent.

In the 32d of Hen. VIII. c. 7 **. A. D. 1540, an act was passed for *The true Payment of Tithes and Offerings*, which having

32 H. VIII. Act for true payment of

* Vide Appendix, No. XXIII. † Of these there were 380, a list of which may be seen in the Appendix, No. XXIV. ‡ Vid. antea, p. 35. § A net rental of 32,000*l.* (abbey lands were usually very lowly letten) came by this act to the crown; besides a gross sum of 100,000*l.* the value of the plate, pearls, and jewels belonging to these monasteries. These sums were then nearly equivalent to 6 times their amount, according to the present depreciated value of money. ‖ Vid. Appendix, No. XXV. ¶ Vide Appendix, No. XXVI. ** Vid. Appendix, No. XXVII.

tithes and offerings.

been afterwards enlarged and confirmed by the 2d and 3d of Edw. VI. I shall reserve my observations upon it, till that act come under consideration.

Same year lands of the Knights of St. John of Jerusalem vested in the king discharged of tithes.

In the same year, 1540, the legislature passed another act, 32 Hen. VIII. c. 24 *, by which they vested in the king the lands and possessions of the knights of St. John of Jerusalem; whose lands having been formerly discharged of tithes, many questions upon such exemptions have been raised by the present owners and occupiers of those lands, claiming the benefit of the original exemptions, as perpetuated to them by the 27th and 31st of Hen. VIII.

Patentees of the crown entitled to the old exemptions.

For better comprehending the law of statute exemption from the payment of tithes, which is annexed to such lands, as retain the effects of the 21st clause of the 31st Hen. VIII. it is to be noticed, that those who claim under the patentee of the crown, stand as to the discharge of tithes precisely on the same grounds, as the abbots or superiors stood at the time of the dissolution, and are to be judged by the laws, as they then existed; particularly as to the national recognition of a right in the pope and councils to direct the appropriation and application of tithes within this realm, upon which the common law of tithing was founded.

The 4 privileged orders exempted from tithes.

† All abbots and priors, and other religious superiors, originally paid tithes as well as other men, until pope *Paschal* the Second exempted generally all the religious from paying tithes of lands in their own hands. And this continued as a general discharge, till the time of King Henry II. when pope *Hadrian* the Fourth restrained this exemption to three religious orders only of *Cistertians*, *Templars* and *Hospitalers*; unto which pope *Innocent* the Third added a fourth, to wit, the *Præmonstratenses*, or (Norbertins.) These were the four privileged orders, which claimed to be discharged from tithes by the pope's establishment.

Restraint by the Council of Lateran.

Then came the general Council of Lateran in the year 1215, and further restrained the said exemption from tithes of lands in their own occupation to those lands, which they were in possession of before that council.

The Cistertians procured bulls to exempt also their lands, which were letten to farm. To restrain which practice, the before mentioned statute of 2d Hen. IV. c. 4. was made.

Exemptions of the Cistertians.

This statute not only restrained them from purchasing any such exemptions for the future, but as to the rest, left their privileges

* Vide Appendix, No. XXVIII. † B. E. L. 379.

as they were before the said statute, that is to say, under a limitation to such lands only, as they had before the decree of the *Lateran* council. They obtained many lands after that council, which therefore were in no manner exempted. That statute left them also, as it found them, subject to the payment of divers compositions for tithes of their demesne lands made with particular rectors; who, contesting their privileges even under that head, brought them to compound.

Scarcely any point in the law of tithing has been more warmly contested, than the construction of these acts of Hen. VIII. as to the exemption of abbey lands from tithes. Doctor Watson (or rather Mr. Place) the writer of the Compleat Incumbent warmly supports the doctrines laid down and adjudged by 3 judges, viz. *Brampston Jones and Berkely*, against *Croke* in the case of *Sydown* v. *Holmes* *, in which according to Sir *William Jones* these three points were resolved.

1st. That an abbot or ecclesiastical person may prescribe in *non decimando*: but, when the corporation is dissolved, or, when the corporation grants the land to a layman, such layman shall not have the benefit of the prescription; for it was personal to the abbot. Opinions in favour of exemptions of abbey lands.

2d. It was resolved *per totam curiam*, that this privilege by prescription, and other personal privileges, by bull or order, belonging to abbies, which were under 200*l.* per annum, and dissolved on the 4 *Feb.* by 27. Hen. VIII. were not preserved and given to the king by that statute.

3d. That privileges by prescription, or by order or bull, are preserved by the clause of 31 Hen. VIII. and neither the king, nor his patentee shall pay tithes. But this extends only to monasteries dissolved after the 4th Feb. 27. Hen. VIII. and therefore the lesser abbies under 200l. per annum, which were dissolved on the 4th Feb. by the 27th Hen. VIII. are not included within the said clause of 31 Hen. VIII.

On the other side Mr. Bohun † more vehemently supports the opposite opinion of Sir George *Croke*. "To shew at large the "errors of that judgment, in the case of *Sydown* v. *Holmes* would "require a just volume; I shall therefore only content myself at "present, with observing, that the opinions of the three judges in "support of it, seem to be grounded chiefly on the notion of tithes "being due *jure divino* to ecclesiastical persons, and to such as Mr. Bohun supports the contrary opinion of Sir Geo. Croke.

* This case is reported by Sir George Croke, 422. but more circumstantially by Sir Wm. Jones, 368.

† Law of Tithes, 287.

" were privileged by the pope's bull, &c. and therefore the lands " they held might well be discharged of tithes, as sacred, whilst " they continued in those sacred hands, which could not be held so " discharged, even by the king himelf, or his patentee, notwith- " standing the said act 27 Hen. VIII. had transferred not only the " said lands, but also all the *tithes, pensions, portions, rights, con-* " *ditions, and interests, in as large and ample manner as the abbots,* " *priors, &c. held the same, &c.* And the consequence of that " judgment must be, that though the act vests the lands so dis- " charged, &c. in the king, yet the king could not hold them so " discharged, &c. A proposition so highly irrational, as nothing " can support it, but that opinion of Berkely, ' that it was a meer " *spiritual privilege*, and determined by the dissolution of the ab- " bies; and that it was tied only to their bodies and persons, &c. " And though the other judges could not come up to the absurdity " of these premises; yet two of them, viz. *Brampston* and *Jones* " (influenced, as supposed,) concurred with him in as absurd a " conclusion; whereas *Croke* seems more impartial and unbiassed " in his judgment, and consequently his opinion must have greater " weight with all unprejudiced and disinterested minds."

" And yet the mischief of that case seems to have been derived " down to our own times; so great is the force of precedent and " example in courts of law, &c. as may be seen in the case of " *Bowles* v. *Atkins* *, where, *though an abbot*, time out of mind, had " held lands discharged of tithes, yet it was adjudged the allience, " or patentee, should be charged with tithes.

Some few of the smaller monasteries not dissolved by 27 Hen. VIII. but by 31 Hen: VIII.

It is further to be observed, that not all the monasteries, priories, and other religious houses, not above 200*l.* yearly value, were dissolved by the statute 27 Hen. VIII. though they might have been so; but some of them were dissolved by this later statute 31 of Hen. VIII. and the reason is, because there is a proviso in the former statute (which indeed is left out in the printed statutes at large,) that notwithstanding that act, the king might by his letters patent, under the great seal of England, continue any of the said monasteries; and therefore such of them as were so continued by the king's letters patent, are not to be looked upon as dissolved by the 27th Hen. VIII. though they be so by 31 Hen. VIII. and so the lands belonging to them, that were holden tithe free before the dissolution, remain so by force of the before cited clause in 31 Hen. VIII. as was adjudged in the exchequer chamber between

* 1 Lev. 185. Trin. 18 Car. II. B. R. and 1 Sid. 320. 2 Keb. 28. 60. 162. 175.

*Walklate**, farmer of the rectory of Utoxeter in Staffordshire, and *Wilshaw*, the owner of a farm there, formerly belonging to the Abbey of Croxden, a small abbey of the Cistertians, which Wilshaw shewed was continued by letters patent, and not dissolved by 27th of Hen. VIII.

Lord Ch. B. Gilbert's opinion upon these exemptions.

With reference to the privileges granted by the pope to the knights of St. John of Jerusalem (the reason applies to all the privileged orders) Lord C. Baron *Gilbert* in the case of *Hanson* v. *Fieldings*†, A.D. 1725, which turned upon a parcel of their possessions being exempt from tithes, spoke thus. "Those privileges were "granted to this ecclesiastical corporation, by bulls from the pope; "but these discharges, for want of a special clause to continue "them, were extinguished in as many of them, as were dissolved "by the 27 Hen. VIII. But that cramping the king in his alie-"nation, in 31 Hen. VIII. they put a clause to continue to the "crown the privileges, that were in them, as special corporations. "Now the question is whether the word "*privileges*" in 31 Hen. "VIII. has the smallest intent to carry all other privileges to the "crown. If the point had not been resolved, we should not have "disputed it." Bunbury, who was council for the defendant, reports; *that the court seemed all of opinion, that it was a good discharge*‡; though the bill were afterwards dismissed from the plaintiff's failing to make out his title. In *Cornwallis* v. *Spurling* A.D. 1605 §. These lands were holden not to be tithe free. By the case in Dyer, 10 Eliz. 277, they were considered not titheable.

No prescription in *non decimando* even against a lay impropriator.

On the 2d day of July 1739, Mr. Bunbury says ‖, "This day "the long controverted question seemed to be settled, viz. that "there can be no prescription *in non decimando*, even against a lay "impropriator, and that the presumption that arises from a con-"stant non-payment, would not be sufficient, unless the defen-"dant could shew, either that the lands were parcel of one of the "greater abbies, or that some of the impropriators had released "the tithes. And Lord C. B. Comyns in giving judgment, says ¶, "Another reason, why a layman should not prescribe against a "lay impropriator any more than against an ecclesiastical person, "is that, because a lay impropriator must claim under a spiritual "or ecclesiastical person; for every patentee of the crown, who "can lay claim to tithes, must claim it by virtue of the statute 31 "Hen. VIII. c. 13; or some other statute for the dissolution of "religious houses.

* Degges Pars Coun. part 2. c. 11. † Gilb. Eq. Rep. 225. ‡ Bunb. 214. § Cr. Jac. 57. ‖ *Corporation of Bury* v. *Evans*, Bunb. 345. ¶ 2 Com. Rep. 650.

"The statute 31 Hen. VIII. is the first act of parliament "which enacted that the king and all persons, who should have any "manors, lands, &c. belonging to the religious houses thereby dis- "solved, should hold and enjoy the same freed and discharged "from the payment of tithes, in as full and ample a manner, as "the abbots, &c. had the same at the time of the dissolution.

Ancient modes of exemption.

"Now it is well known, that none of those religious persons could "be exempted from the payment of tithes but by order, the pope's "bull, composition real, prescription, or unity of possession; and "every patentee of the crown, that is, every lay impropriator, "must allege a title to the tithes, which he demands, by grant "from the crown of some rectory, vicarage, or other tithes, which "were part of the possessions of some religious houses, which "came to the crown by that or other statutes; and therefore as "Lord Hobart says in *Slade and Drake's* case a temporal person "succeeding a spiritual person in discharge, (and it is the same in "the perception of tithes) it is to be reckoned in a spiritual person, "and not in a temporal; and consequently a man, who could not "prescribe against an ecclesiastical person, cannot any more prescribe "against the patentee, who derives his title from and under him, "and is in the nature of his representative." And with reference to the unity of possession, and the manner, in which the patentee should effectually avail himself of it, he says *, "not only that "ought to have been expressly alleged in the answer, but it ought "likewise to have been shewn, that the abbot and convent had "been seized of the rectory and lands *simul et semel* time out of "mind, and continued so seized till the time of the dissolution; "for according to *Priddle* and *Napper's* case †, every unity, which "amounts to a discharge from the payment of tithes, by virtue of "the statute 31 Hen. VIII. ought to have four qualities. It "ought to be rightful, and not commence by wrong. 2d, It "ought to be equal, that is, the abbot and convent ought to be "seised of the rectory and land both in fee. 3d, It ought to be "perpetual, having continuance time out of mind. 4th, It ought "to be constantly free from payment; for if the tenants for years, "or will, under the abbot and convent ever used to pay tithes, the "unity will not avail."

How lands discharged by unity of possession.

"And Lord Hobart adds a fifth quality; it must have constant "continuance in the same body, else it is of no force. *Wright and "Gerrard*, Hob. 310, 311.

* 2 Com. Rep. 659. † 11 Com. Rep. 14. 6.

"And the same qualifications have been agreed and confirmed "by many subsequent resolutions and authorities."

The lands of the knights of St. John of Jerusalem discharged of tithes.

It was for a long time holden by the common law courts at Westminster, that the only religious houses, which were exempt from payment of tithes, were those, which came to the crown by the statute 31 Hen. VIII. c. 13. by reason of the express clause of discharge in that statute; and therefore the lands of the knights of St. John of Jerusalem, which came to the crown by the 32 Hen. VIII. c. 24, were not exempt from their payment for want of an express clause therein to that purpose: but notwithstanding there had been divers resolutions to that effect, yet those opinions of the courts were never fully acquiesed in. And this point was often afterwards brought in question, till in the time of the Lord Chief Justice Hale in the case of *Fosset and Franklin*, the matter was finally determined by the unanimous opinion of the whole court of B. R. that the lands of the knights of St. John of Jerusalem were discharged from tithes, and then all the cases were very fully considered*.

Cistertian lands exempt from tithes, tho' granted by the crown before 31 H. VIII.

The last case, which I find before the court upon these statutes, is that of *Tate* v. *Skelton* in the exchequer A. D. 1798†, which was a bill "by the rector of *Coningsby* in the county of *Lincoln* for "the great and small tithes of the parish. The defence set up by "the answer was, that the lands, whereof the tithes were demanded, were formerly part of the possessions of the abbey of *Kirkstead*, which abbey was of the order of *Cistertians*: that it was "dissolved by Hen. VIII. and its possessions vested in the crown: "that at the time of the dissolution, the lands in question were in "the manurance and occupation of the abbot and convent; and "were holden by them at such time discharged, and exempt "from the payment of tithes: that the lands were now vested in "the defendants, who were severally seised of estates of inheritance therein, and that they were exempt and discharged from "the payment of tithes, whilst in the manurance and occupation of "the owners thereof; and that no tithes, or any composition or "satisfaction in lieu thereof, had ever been paid for them, when "they had been in such manurance and occupation."

"It was proved in this case, that the lands belonged to the "abbey of *Kirkstead*; and that that abbey was a Cistertian abbey: "that the lands were granted to the abbey by King *John* in 1210,

* *Porter* v. *Bathurst*, A. D. 1619. 2 Cro. 559. Dyer, 277. and *Wilson* v. *Reedman and others*, A. D. 1662, Hard. 190. † 4 Gwil. MS. 1503.

" which was five years before the last council of *Lateran*: and " there was a great deal of parol evidence, shewing that no tithes " had ever been paid in respect to the lands, when they were in the " manurance of the owner. But it was also in proof, that the " monastery with its possessions had come to the hands of the king " in 28 Hen. VIII. by the attainder of *Richard Harrison* *, the " abbot, and that these lands were granted in 30 Hen. VIII. by " the crown to the Duke of *Suffolk* in fee. It was contended " therefore by *Partridge* and *Richards* on the part of the plaintiff, " that as the lands were not in the possession of the crown, when the " statute of 31 Hen. VIII. was passed; as the crown had parted " with them before that time; they were not within the protection " of the 21st section of that statute: that when in the hands of the " Duke of *Suffolk*, they were liable to the payment of tithes; that " being in his hands, and so liable at the time of passing the act, " the act could not attach upon them; that this act was to be con- " strued like the statute of *wills*, where the word *having* confines " the power of devise to those lands only, which the testator had at " the time of making the will.

" But the court were of opinion, the statute of 31 Hen. VIII. " was sufficiently broad to comprehend all monasteries, which " were dissolved after the 4th of February, 27 Hen. VIII. and " that the lands of any such monasteries were exempt from the " payment of tithes under that statute, though the crown may have " granted them away before the statute was passed. And they cited " in support of their opinion the case of *Walklate* and *Wilshaw* †."

37 Hen. 8. Of tithes in London.

The only remaining act passed in the reign of Hen. VIII. touching tithes, was the 37 Hen. VIII. c. 12 ‡. entitled *An act for Tithes in London.* It is a very important act, and requires some historical observations to render it fully explicit and illustrative of the principles already laid down, before the determinations of the

* " This unfortunate abbot, (observes Sir Henry Gwillim,) was attainted of high " treason. The treasonable act was, his refusal to surrender to the king the possessions " of his convent. Whether such a refusal were a treasonable offence; or, whether a " corporation aggregate would incur a forfeiture of their possessions by the attainder of " their president, are questions which, perhaps, a modern lawyer would hesitate to an- " swer in the affirmative."

† Deg. Par. Couns. 326, 327. Vide antea, p. 153. This farm being parcel of the possessions of the abbey of *Croxden*, which was one of the small abbies, and of the *Cistertian* order, it was discovered to have been continued by letters patent under the great seal of *England*, and so not dissolved till 31 Hen. 8. whereupon the defendant was dismissed, and the court clearly held the lands discharged of the payment of tithes by the statute 31 Hen. 8.

‡ Vid. App. No. XXIX.

courts upon it are taken into consideration. It has been observed (p. 126.) that houses are not of common law titheable; yet is it not to be presumed, that the *civil magistrate* of a country, which had so radically interwoven the civil establishment of a christian clergy into its constitution, should leave the clergy of the most populous and opulent part of that country without some regular and fixed maintenance, although it should not arise out of lands, or the produce of lands, which was the general common law fund of their maintenance throughout the nation. It is not my aim to trace, with chronological precision the source, progress, and final establishments of particular tithes or customs in particular places: but to fix upon some notable epoch of sufficient antiquity to establish the full and free assent of the nation to their existence in some given manner, form, and quantity. In this instance I rest on the days of Hen. VI. (he reigned from 1442 to 1461) in which wrote *Lyndwood*, who in stating what was the common law in his day, proves the antiquity, at least, of what could not otherwise have grown before his time into a prescriptive right. In the great case of *Dunn* v. *Burrell and Goff*, A.D. 1617 *, Sir *Henry Finch*, who was of council with the plaintiff gives the following short historical account of the payment of tithes in *London*. "Before I go into the particular question now to be treated of, I will shew in what manner, and how, tithes and offerings ought to be paid in *London*. As to this, *Lindwood*, in his book *de decimis*, in the chapter *Sancta ecclesia*, in his gloss on the word, *negotiationum*, sayeth, *quod artifices, et negotiatores scivitatis London, ex ordinatione antiquâ in dictâ civitate observatâ, tenentur singulis dominicis diebus, et in principalibus festis sanctorum apostolorum et aliorum quorum vigiliæ jejuantur, offerre pro singulis decem solidis redditus domus, quam inhabitant unum quadrantem. Et ordinatio prædicta indifferenter arctat quoscunque inhabitantes, sive sunt artifices, sive mercatores, sive quivis alii.* This ordinance mentioned by *Lindwood* had reference to a constitution made by *Niger* Bishop of *London* in 13 Hen. III. A. D. 1228, which was confirmed in 21 R. II. by *Thomas* then archbishop of *Canterbury*, and afterwards by pope *Innocent* in 5 Hen. IV. and subsequent to that, in 31 Hen. VI. pope *Nicholas* ordained by his bull, that tithes should be paid of houses in *London* as above; a valuation being made of

Sir Henry Finch's opinion of tithes in London.

* A very full note of this case is given in Sir *Henry Gwillim*'s valuable collection of cases, (vol. 1. 299 to 329.) from Sir *Henry Calthrop*'s MSS. an abstract of which is to be seen in *Calthrop's Reports of Special Cases, touching the Customes and Liberties of the Citie of London*, 54.

" them, according to the true and usual value of houses, and the " rate according to that proportion amounted to 3*s.* 5*d.* in the " pound for each house; for there were 82 vigils of saints, that " were fasted, and of *Sundays.* In 36 Hen. VI. there was a com- " position made between the citizens and clergy of *London*, that " a payment should be made by the citizens for their houses accord- " ing to the above rate, and if the houses were kept in the hands " of the owner, or if they were leased out without reserving any " rent, the churchwardens of the parish, where the houses were, " should set down a rate of the houses, and according to that rate, " a payment should be made. In the 14 Edw. IV. an act of com- " mon council in *London* passed for the confirmation of the bull " granted by pope *Nicholas.* But there being afterwards a great " variance between the clergy and citizens, they submitted them- " selves to the award of the lord chancellor, and several others of " the privy council, who in 1535 made an order, that every inha- " bitant and citizen should pay at the rate of 16*d.* for every house, " and in 27 Hen. VIII. there was a proclamation made for con- " firming that order; and in the same year, as it appears by the " statute of 27 H. VIII. c. 15. there was a statute made to ratify " the said order, and a proclamation issued as I have mentioned, " until an order for the payment of tithes should be made by 32 " persons, to be nominated by his majesty: but no such order be- " ing thereupon made, the king making no nomination, and other " disputes arising concerning the payment of tithes and offer- " ings, then passed the statute of 37 Hen. VIII. c. 12."

By award in 1535 each house paid 1*s.* 4*d.*

Under these circumstances was brought forward that notable and important case, the nature and points of which are thus briefly set forth by Sir *H. Calthrop*, " *Richard Burrell* being seized in his " demesne, as of fee, of a house, called *Green-acre*, a shop and " warehouse in the parish of *Gracechurch Street London*, for which " house a rent of 5*l.* yearly hath been reserved, time out of mind, " in the third year of the king that now is, by indenture doth make " a lease for five years unto one *Withers*, of part of the house and " of the shop, rendring the rent of five pound by the year, at the " four usual feasts, that is to say at the feast of the *annunciation*, &c. " by even and equal portions. And in the same indenture, it is " further covenanted and agreed, that *Withers* the leasee shall pay " unto *Burrell* the leasor, a hundred and fifty pound in name of " a fine and income, the which said hundred and fifty pound is to " be paid in manner and form following; that is to say, thirty " pound yearly, and every year during the said term, at the four

Notable case upon tithes in London.

" usual feasts, by even and equal portions. The term of 5 years " expired, the said Burrell in the tenth year of the said king, by " indenture, maketh a new lease for the term of seven years, of " the said part of the house and the warehouse, unto one *Goff*, " rendring the rent of five pound by the year, at the feast of St. " *Michael* the *Archangel*, and the *Annunciation* of the Blessed Vir- " gin *Mary*, by even and equal portions. And in the same in- " denture, it is further covenanted and agreed, that *Goff* shall pay " unto the said Burrell 175*l.* in the name of a fine and income, in " manner and form following, that is to say, twenty-five pounds " yearly during the said term, at the said 2 usual feasts, by even " and equal portions. *Dunn*, parson of Gracechurch, exhibiteth " his petition unto the Lord Mayor of *London*, against the said " *Burrell* and *Goff*, wherein he supposeth that tithes are paid unto " him only according to the rate of 5*l.* by the year, where in " truth, he ought to have an allowance according to the rate of " thirty pound by the year. The Lord Mayor, by the advice of " his counsel, doth call the said *Burrell* and *Goff* before him, and " upon full hearing of the said cause, doth order the payment un- " to *Dunn*, according unto the rates of 5*l.* by the year, and not ac- " cording to the rate of thirty pound by the year; where upon the " said *Dunn* doth exhibit his Bill of Appeal unto the Lord Chan- " cellour of *England* in the Chancery, wherein he doth make a re- " cital of the decree made, and established by act of parliament, in " 37 Hen. VIII. c. 12. and also of the case special, as it standeth, " charging the said *Goff* and *Burrell* with a practice of fraud and " coven, in the reservation of this twenty-five pound by the year, " by way of fine and income, and defrauding him of that, which " belonged unto him: the said *Goff* and *Burrell* do make their " answer, and shew that the rent of five pound by the year is the " ancient rent reserved, and that they are ready, and have often " tendred the payment of their tithes according to that proportion, " but it hath been denied to be accepted, and they do take a tra- " verse unto the fraud and covin, wherewith they stand charged. " And upon this answer, *Dunn* the parson demurreth in law. And " this case was first argued in the Chancery, by Sir *Francis Moor*, " Sergeant, and *Thomas Crew*, on the behalf of *Dunn*; and by " Sir *Anthony Benn*, the Recorder of *London*, and *John Walter* on " the part of the defendants. The Lord Chancellour having called " Sir *Henry Montague*, Chief Justice of the King's Bench; Sir " *Henry Hobart*, Chief Justice of the Common Pleas; Sir *John* " *Doddridge*, one of the Justices of the King's Bench; and Sir

Argued in Chancery.

" *Richard Hutton*, one of the Justices of the Common Pleas, to " be his assistants; and after two arguments heard on each side in " the Chancery, upon suit made to the King, by Sir *Francis Ba-* " *con*, then Lord Chancellour of *England*, a special commission " was granted unto *Thomas*, Lord Archbishop of *Canterbury*; Sir " *Francis Bacon*, Lord Chancellour of *England*; *Thomas*, Earl of " *Suffolk*, late Lord Treasurer of *England*; *Edward*, Earl of *War-* " *wick*, Keeper of the Privy Seal; *William*, Earl of *Pembroke*, " Lord Chamberlain of the King's Household; *John*, Bishop of " *London*; ——, Bishop of *Ely*; Sir *Henry Montague*, Sir *Julius* " *Cæsar*, Master of the Rolls; Sir *John Doddridge*, and Sir *Ri-* " *chard Hutton*; wherein there was a special recital of the ques- " tion and cause depending between *Dunn* on the one part, and " *Burrell* and *Goff* on the other part; and power given unto them " for the hearing and determining of this cause, and likewise for " the mediating between the citizens of *London*, and the parsons of " the several parishes and churches in *London*, and making an arbi- " trary end betwixt them, whereby a competent provision may be " made for the ministers of the churches in *London*, and too heavy " a burthen may not be imposed upon the citizens of *London*; with " a command further, that they shall certifie the king what was " done in the premises. And this commission was sat upon at " *York House*, where the case was argued at several times, by Sir " *Randall Crew*, and Sir *Henry Finch*, Sergeants of the King, on " the part and behalf of the ministers of *London*, and by Sir " *Henry Yelverton*, attorney of the king, and Sir *Thomas Coventry*, " sollicitor of the king, on the behalf of the citizens of *London*; " and because the main question remained as yet undetermined, " and no resolution is given either in point of law nor arbitrary " end by way of mediation, I shall only open the parts of the " case and make a summary report of them without further debate " of them."

Again before commissioners at York House.

" *The case divideth itself into six parts, (that is to say).*

" First, whether any thing can be demanded by the person for " houses in *London*, according to the course of common law?"

" Secondly whether, custom can establish a right of payment " of any thing unto the parson for houses, and of what nature the " payment established shall be?"

" Thirdly, what was anciently payable by the citizens of " *London* for their houses unto the ministers of *London*, and how " grew the payment?

" Fourthly, whether this twenty five pounds reserved upon a

" covenant by way of fine and income, be a rent within the words " of the decree, made, 37 Hen. VIII. c. 12?"

" Fifthly, whether this reservation of twenty five pounds by the " year, by way of fine and income, shall be adjudged to be a rent, " within the intent and meaning of the statute and decree, or " no?"

" Sixthly, who shall be judge of the tithes for houses in *London*? " and the remedy for the parson, in case that payment be not made " unto him according to the decree."

Fine and income is not that species of rent according to which London houses pay tithe.

At the time this learned knight (who was recorder of *London*) prepared this case for publication, it appears, that the judgment of the commissioners had not been given; yet his full MS. note as published by Sir *Henry Gwillim* * informs us, that it was agreed by the Lord Chancellor and the other assistants, 1st, that the 25*l. per. annum*, reserved by way of fine and income was not a rent. 2d, it was ordered, that the records, which had been cited, should be produced. For if the rate paid of ancient time, was only 2*s.* 6*d.* and so the decree went in amplification of the ancient proportion, then it was of some moment, *Niger*'s constitution being *ex antiquâ consuetudine, et tempore præscriptibili.* 3d, The record in the 32 Hen. VI. was a record made by the citizens themselves, and therefore not of so great authority.

Suits for tithes in London in the mayor's court. If spiritual court interfere prohibition shall issue from B. R. though it cannot try the cause.

Upon the like grounds had been before determined A. D. 1695, in the case of *Meadhouse* v. *Taylor* in B. R. in a prohibition to a suit in the spiritual court, for tithes of rent in *London*, that by 37 H. VIII. c. 12. the suit ought to be before the Mayor of *London*, by complaint in writing, in nature of a *monstrans de droit*, declaring all the title. And if the suit be in the spiritual court, the court of B. R. may grant a prohibition, though it have not power to meddle with them. 2d, It was resolved, that a reservation by a lessee for life, who leases for years to A, is not sufficient to bind him in the reversion to pay tithes according to that rate. 3d, That a rent for half a year, and afterwards for another half year, is a yearly rent within the meaning of that decree. And note, as the same was last let, is not intended last before the decree, but before the demand of the tithes.

2*s.* 9*d.* in the pound payable under 37 H. 8

Upon this statute of the 37 H. VIII. another very notable case was determined in the year 1722, much against the interest of the clergy, (and some have thought rather against general principles). The case of *Doctor Bennett* v. *Trepass* and *others* †, was brought

* 1 Gw. 329. † Bunb. 106. Gilb. Eq. Rep. 191. 4 Bro. P. C. 652.

seven different times before the court of exchequer, besides the appeal to the lords. Doctor Bennett, the vicar of *Cripplegate*, brought his bill against some of his parishioners for 2*s*. 9*d*. in the pound for tithes of houses in *London* under the 37 Hen. VIII. Baron *Price* was for decreeing for the plaintiff, but *Montague*, *Page*, and *Gilbert* directed an issue to try, whether there had been such customary payments (under that rate) as were set up by the defendants, although there were no proof of any regular *modus*: and a verdict was found for the defendants. Dr. Bennett appealed, and the lords dismissed his appeal, and affirmed the decree of the exchequer. In *Green* v. *Piper* *, A. D. 1592, it was holden in B. R. that a house in *London*, (having been part of a priory discharged of tithes by a pope's bull) was liable to pay tithe according to the ordinance of 37 Hen. VIII. For before the statute no *dwelling house* was titheable: and only noblemen's houses are excepted from the statute payments. Two very important points upon tithes in *London* were determined at very distant periods from each other; viz. *Sheffield* v. *Pierce* A. D. 1657 †, and the *Warden and minor canons of St. Paul* v. *Cricket and another*, A. D. 1795 ‡, viz. that notwithstanding the 37 Hen. VIII. give jurisdiction to the mayor's court over tithes in *London*, it took not away the jurisdiction of the Chancery and Exchequer over them: and they decreed accounts of tithes in *London* at 2*s*. 9*d*. in the pound on *the improved rent*. In *Ivatt* v. *Warren* §, A. D. 1618, a plea to the jurisdiction of the court of exchequer was overruled. The bill was for tithe in the parish of St. *Botolph*, within Aldgate, at the rate of 2*s*. 9*d*. in the pound. The defendant insisted upon a custom within that parish to pay less than that rate. The plaintiff replied: The defendant rejoined, and descended to a perfect issue, and afterwards there were several orders for the bringing in of the tithes into this court due from the defendant after 2*s*. 9*d*. in the pound according to his rent. And the said cause coming to hearing before the lord chief baron and the other barons, upon a full and deliberate hearing; for that the defendant made no sufficient proof of any custom within the said parish for the payment of tithes, the said court conceiving the meaning of the said decree and act of parliament was, that the inhabitants within the city of *London* and liberties thereof, ought to

Only noblemens'houses in London discharged from the statute payment.

Notwithstanding mayor's court have cognizance of tithes under 37 Hen. 8. yet chancery and exchequer retain also jurisdiction over them.

* Cro. Eliz. 276. and Moore, 912. † 1 Wood, 38. ‡ 2 Vezey, Jun. 563.

§ 3 Gwillim, 1054. MS. extract from the Decree Book. There are many other cases, which recognize the jurisdiction of the Exchequer and Chancery over *London* tithes, as *Langham* v. *Baker*, 1658, Hard. 116. *Sayer* v. *Mumford*, 1694, 2 Gw. 545. and *Kynaston* v. *Miller*, A. D. 1752. in Canc. 3 Gw. 903.

pay for the tithes of their houses after the rate of 2*s.* 9*d.* in the pound, according to the true value, as the same were worth to be letten *per ann.* and that if the same had been a shed, (as was pretended,) yet ought the same to be discharged of tithes no longer than the same is continued a shed; for being converted to a dwelling-house, the same ought to pay tithes according to the true value. It was thereupon ordered and decreed, that the defendant should thenceforth pay to the plaintiff, &c. according to the true intent and meaning of the said decree of 37 Hen. VIII. and that all those, who should thereafter inhabit and dwell in the said house, should pay the tithes for the same, as is before expressed according to the true intent and meaning thereof.

The statute composition of 2*s.* 9*d.* in the pound payable according to the true value of the house to be letten.

In *Bramston* v. *Heron and others*, A. D. 1787 *, a bill was filed by the lessee of the rector of St. *Botolph*, *Aldersgate*, for tithes in *London*, under the 37th Hen. VIII. The defendants put in several answers. Lord Chief Baron Eyre's judgment was very explicit and conclusive upon the effects of this statute. "The plaintiff has a *primâ facie* title; the burthen of proof is on the defendants. As to *Heron*, he has said that there is no title under the decree, and if he had proved a customary payment generally through the parish, to be sure he would have made out his assertion; but he has not done so. He has next said, that his house is a new built house on the site of two old houses and buildings, which have never paid any tithes; and his proof of this has gone back for thirty years last past: and if that could be shaped into a defence on the general non-payment, he must succeed.

Lord Ch. B. Eyre's explicit judgment on the effect of the statute.

"But it was properly urged, that admitting it to be true, that it was built on the site of two old houses, this would be no defence, unless it had been shewn that a less rate had been paid; for an exemption will not do. This is a mansion-house rent. The first part of the decree makes it general: and it is a rational mode of tithing. That all houses were intended, is evident from the clause which directs, that dwelling-houses converted into warehouses, &c. and warehouses, &c. converted into dwelling-houses, shall still pay as mansion-houses, and also from the exemption in favour of noblemen's houses and the halls of companies. As to the clause in exemption of detached sheds, &c. this is not an exemption in favour of the land: for buildings, not the land, are the subject of the act; and we think the privilege not extended to the building, when altered to another

* 4 Gwil. 1314.

" thing. *Heron* therefore cannot defend himself by non-payment " for 30 years: but the decree must be against him without costs. " As to all the other defendants, except *Underwood* and *Fleet*, the " decree must be against them for the sums claimed by the plaintiff " with costs. As to Underwood, he insists upon an old rate, be- " cause he occupies a new house built on the site of five old ones: " and if new, I should have held it applicable to general payments, " not particular ones. But I am of opinion, that the fact is here " not made out, the payment being only for 12 years, and a very " large one too. Nor can I agree that 8 years constitutes a cus- " tomary payment within the true meaning of the act. For the " only clause which mentions 8 years, is that, which respects the " conversion of houses into shops, &c. There must be a decree " therefore against him, and that with costs. And the same " against *Fleet*."

2 and 3 Ed. 6. The great tithe act.

The most material and important act affecting tithes is the 2d and 3d Edw. VI. cap. 13. A. D. 1558, intituled, *An Act for Payment of Tithes**. It enlarges and confirms the 28th Hen. VIII. and proceeds to enact the due and fair-setting out of all prædial tithes, in such manner and form, as they had been yielded and paid within the last 40 years, or of right and custom ought to have been; and annexes to the substraction of tithes the forfeiture of treble their value. It proceeds to enact, that if any person shall carry off his prædial tithes before the tenth part is duly set forth, or agreement is made with the proprietor, or shall stop or hinder the proprietor of the tithes, or his deputy, from viewing or carrying them away, such offender shall pay double the value of the tithes with costs, to be recovered before the ecclesiastical judge, according to the king's ecclesiastical law. By the first section of this statute the *treble* value of the tithes, so substracted or withholden, might be sued for in the temporal courts, which is equivalent to the double value to be sued for in the ecclesiastical: for one may sue for and recover in the ecclesiastical courts, the tithes themselves, or a recompence for them, by the ancient law, to which the suit for the double value is superadded by the statute; but as no suit lay in the temporal courts for the substraction of tithes themselves, therefore the statute gave a *treble* forfeiture, if sued for there, in order to make the course of justice uniform, by giving the same reparation in one court as in the other. It fixed, moreover, the owner of the cattle with the payment of the agistment tithe, where the cattle fed on wastes, &c. whereof the parochial limits were not ascertained. It rendered barren land titheable after 7 years improvement, (except

The double value recoverable in the spiritual court is equivalent to the treble value recoverable in the temporal court.

Owners of cattle feeding on unascertained wastes pay agistment tithe.

* Vid. antea, p. 135, and App. No. VI.

discharged by privilege or prescription). It declared that every person exercising merchandize, bargaining, and selling, cloathing, handicraft or other art or faculty, being such kind of persons, and in such places, as within forty years had been accustomably used to pay such personal tithes, or of right ought to pay (other than such as had been commonly day labourers) should at or before Easter, pay for his personal tithes, the tenth part of his clear gains; his charges and expences, according to his estate, condition, or degree, to be therein abated, allowed, and deducted, keeping up all local customs of the last 40 years. But the act provided, that on neglect or refusal to pay, the ordinary of the diocess might summon and examine the party, by all lawful and reasonable means, other than by the party's own corporal oath, concerning the true payment of the said tithes.

Merchandize, &c. to pay tithes according to the custom of last 40 years.

Ordinary may summon and examine parties, though not on their oaths.

Sir *Simon Degge* * has observed, that this act of parliament restrained the canon law in two things, viz. First, that whereas the canon was general, that all persons in all places should pay their personal tithes; this act restrains it to such persons only as had accustomably used to pay the same within 40 years before the passing of the act.

Common law restrained in these two last instances by the statute.

Secondly, whereas by the ecclesiastical laws they might, before the making of this act, have examined the party upon his oath, concerning his gain, this act put a restraint upon that practice, so that the party was not (by them) to be examined on oath concerning his gain, &c.

The restraint of the clergy from exacting personal tithes from common day labourers, and poor servants, was a further innovation upon the general words of the canon law: a practice in some few instances heretofore resorted to. This salutary provision bespeaks the mind of the legislature, that any pressure on the poor by decimal exaction is against the spirit of the laws of England †.

This act keeps on foot the payment of all such offerings at Easter, as had been customarily paid within the last 40 years, and is not extended to fishing towns, which have customarily paid tithes in fish, or to the cities of *London* and *Canterbury*, or other towns, which paid tithes in houses. It ascertains the jurisdiction and process of the spiritual courts: and excepts marriage goods in *Wales* from payment of tithes.

Easter offerings restricted to 40 years custom.

Exception of fishing towns which have paid customary tithe in fish, and of London and Canterbury.

Such parts of this act as relate to the jurisdiction of courts, and

* Degg, Par. Coun. 340.

† With how much more force, alas! will this observation apply to Ireland!

remedies for recovering tithes, will fall orderly under our observation in the 3d book.

Many determinations have been made upon different parts of this statute.

No obligation in a bill in equity to waive the treble value, though customary.

In *Driver* v. *Man*, A. D. 1661 *, upon a bill in equity for tithes of corn and grain and a demurrer to it, because the single value was not barely demanded; but it was a bill of discovery only to enable the plaintiff to recover the treble value; *sed non allocatur*; for that tithes were suable for in this court, before the statute; *quod nota et quære*, because it is contrary to the common practice and usage to have such a bill without alledging that the plaintiff is contented to receive the single value only. So in 1724, in *Waters* v. *Vincent* †, it was said; this differs from the case of a tithe bill, "which used "indeed formerly to be with a waiver of penalties, but has of late "been discontinued, because the bill pays only the single value of "the tithes." So the court in a recent case, A. D. 1792, *Wools* v. *Walley* ‡, determined, that it was not necessary in the bill to waive the treble penalty; being of opinion, that a waiver in equity is no bar at law, but only a ground for the interposition of the courts of equity, and an injunction would be granted against suing for the penalty, as well upon this implied waiver, as upon the most express.

Whilst a parol agreement with parsons lasts it excuses from penalties of 2 & 3 Ed. 6.

In the year 1661, by the case of *Breamer* v. *Thornton and others* §, it was determined, that a parol agreement of the parson with his parishioners for a composition, excuses them from the penalties and damages given by the 2 and 3 Edw. VI. and also from costs until notice given of the parson's dissent from the agreement.

In 1673 ‖, to a bill for a *modus* the defendant pleaded a verdict and judgment obtained in an action of debt brought against him for not setting out his tithes in kind under the 2 and 3 Edw. VI. and it was allowed.

Barren land within the statute must produce no profit to the owner.

In 1698, in an anonymous case in the exchequer ¶, these two points upon the 2 and 3 Edw. VI. were determined viz. 1st, that land, where wood had grown, and was stocked up and converted into tillage, is not such barren land, as ought to be exempted from payment of tithe; but only such is intended barren land, which before the plowing produced no profit to the owner. x

Parson cannot justify coming upon

2dly, That the parson could not justify his coming to set out tithes, without the consent of the owner; because by stat. 2 and 3

* Hard. 190. † Bunb. 193. ‡ 1 Anst. 100. § Hard. 203.
‖ *Bluck and others* v. *Elliott*, Ca. temp. Finch, 13. ¶ 1 Freeman, 334.

x vide Stockwell v Terry 1 Ves. 115

Edw. VI. chap. 13, the owner is to set out his tithe; and if he do not, he is liable to the penalty of the statute.

the land without consent to set out his tithe which ought to be done by the owner.

In the much contested case of *Chamberlayne* v. *Newte*, which came before the lords in 1706 *, who reversed the judgment of the Exchequer, which had decreed to the rector the payment of a 10th toll dish of a new mill: the lords were of opinion, that tithe was due of a new mill, not by 10th toll dish, but by the tenth of the clear profits, as being a personal tithe, on which occasion Lord C. J. *Holt* said †, "now suppose these tithes to be perso-"nal; yet, they are not within the reach of 2 and 3 Edw. VI. "because they are not due by custom, but by act of parliament; "and though, in their nature, they are personal, yet they have "some resemblance to predial. The canon does not oblige unless "received and submitted to. Personal tithes universally are re-"quired by the canon, but not due by the law of *England*; but "only in those places, where the canon hath been submitted to."

New mills pay by 10th of profit not by 10th toll dish.

Canon binds only where submitted to.

In the year 1729, in the case of *Keliñac* v. *Gwavas* ‡, it was determined in the lords, that tithes of fish are payable only by custom and cannot be claimed as a mere personal tithe, *deductis expensis*: for where tithes in kind are due only by custom, it seems impracticable to deduct the expences.

Fish a mere customary tithe, and not demandable as personal *deductis expensis*.

In the reign of Elizabeth some acts passed, which affected the general subject of tithes and other church property, though they did not particularly touch the payment of tithes, as in 1570 13 El. c. 10. that disabling act, by which fraudulent deeds made by spiritual persons to defeat their successors of remedy for dilapidations are made void. Another in the same year c. 20, *for disabling incumbents from leasing and charging their livings with cure.* In the next year an act, c. 11. (which was for *reviving, continuing, and explaining several former acts*) was passed, which contained several clauses affecting the two acts of the preceding year, by which bonds and covenants made for the enjoyment of leases contrary to those acts are avoided, and also for avoiding leases made by curates, as if made by the beneficed person himself. In 1601, El. c. 9, an act passed *for reviving and continuing several former acts*, and the 8th, section continues the 13 El. c. 20, and avoids judgments as well as bonds and covenants for enjoyment of leases §.

Several acts of Elizabeth affecting the general subject of church property.

Many compositions formerly made between parson and parishioners, with consent of the ordinary and patron, have been made for discharging certain lands from tithes, in consideration of other land, or

* Vid. ant. p. 127. † 2 Gwil. 600. ‡ 2 Br. P. C. 446. § Vid. these acts, App. No. XXX.

the payment of money in lieu and satisfaction of such tithes (we shall speak of compositions in the next chapter,) and they were heretofore considered binding, until the disabling statute of 13 El. c. 10. was made, which prevents, among other spiritual persons, all parsons and vicars from making any conveyances of the estates of their churches, other than for 3 lives or 21 years; so that now by virtue of this statute, no real composition, made since 13 *Eliz.* is good for any longer term, than 3 lives, or 21 years, though made by consent of patron and ordinary, which has indeed effectually demolished this kind of traffick, such composition being now rarely heard of, unless by authority of parliament. This appears from the case of *Blair* v. *Cholmley*, A. D. 1765 *, in chancery before Lord *Northington*, whose decree against the validity of such a composition, was upon appeal affirmed by the Lords. The purport of that decree was, that an agreement made 80 years before between the incumbent and his parishioners for a certain pecuniary compensation in lieu of tithes in kind will not bind his successor, though ratified by a decree in equity. The great case of *Bree* v. *Chaplin*, which went also by appeal to the Lords, shews, that no composition real made since the 13th Eliz. can bind; for there the issue directed by the Exchequer, (upon which a verdict had been found for the defendant, and a new trial ordered, and which order was appealed from and affirmed by the Lords †,) was, "whether some ancient, lawful and valid composition real was "made before the reign of Queen *Elizabeth*, by and between the "parson, patron and ordinary, of the parish of *Rysome*, otherwise "*Rysolm*, by virtue whereof certain ancient payments of 15*l.* 10*s.* "1½*d.* to wit, 15*l.* pounds in money was made payable half "yearly at *Lady-day* and *Michaelmas*, in each year, to the rector "of the said parish, for the time being, and 10*s.* 1½*d.* residue of "the said 15*l.* 10*s.* 1½*d.* was to be paid to the archdeacon of *Stowe*, "within the diocess of the Bishop of *Lincoln*, for procurations and "synodals yearly, and which have been paid from ancient time, "before the reign of Queen *Elizabeth*, to wit, from the time of "making such real composition, by the owner for the time being, "of all the lands within the said parish, except *Grange de Lyngs* "aforesaid, in lieu and full satisfaction of all tithes whatsoever, "offerings, oblations, obventions, and other ecclesiastical dues, "possessions, and rights whatsoever, yearly arising, renewing, in-

Since 13 El. no composition for more than 3 lives or 21 years good, though with consent of patron and ordinary.

Decree in equity will not ratify such composition.

* Amb. 510, where it is very shortly and imperfectly reported. But there is a very full report of it before the Lords, with Lord *Northington*'s argument in a note, in 7 Br. P. C. 34.

† 3 Wood, 414. 7 Br. P. C. 204.

"creasing, or payable upon or from all the lands within the said "parish, or the titheable places thereof, or belonging to the said "ancient rectory; and whether the said ancient payment of 15*l.* "hath been constantly and regularly paid for a long series of years, "down to *Michaelmas*, in the year of our Lord 1766, to the plain- "tiff's predecessors, rectors of the said parish for the time being, "or to some persons for their use, and by them, the said rectors, "together with the payment of the said 10*s.* 1½*d.* in manner afore- "said, received, taken, and accepted during the time aforesaid, "in full satisfaction, in lieu of all tithes whatsoever, offerings, ob- "ventions, oblations, and other ecclesiastical dues, possessions, "and rights yearly arising, renewing or payable within the said "parish of *Rysome*, otherwise *Rysolm*, exclusive of *Grange de* "*Lyngs* aforesaid, and the titheable places thereof, belonging to "the said rectory."

Composition by deed between parson, patron, and ordinary of above 100 years, not available against parson's general title to tithes in kind.

The like doctrine was further established in the case of *Mortimer* v. *Lloyd*, which also came by appeal before the Lords in 1777 *, in which it was determined, that a parson might avail himself of his general title to tithes in opposition to a pecuniary composition, even though established by deed, above a century before, (viz. 22d Sept. 1676,) executed by parson, patron, and ordinary.

Act of Car. II. in consequence of the fire of London.

In the year 1670, 22d and 23d Car. II. c. 15†. another act was passed respecting the tithes of *London*, the title of which act bespeaks its purport: *An Act for the better settlement of the maintenance of the Parsons, Vicars, and Curates, in the Parishes of the City of* London, *burnt by the late dreadful fire there.*

If Lord Mayor neglect his duty, Chancery may upon petition issue warrants for levying sums assessed for tithes.

As this act seems to confine the minister's remedy for recovering his tithe to the Lord Mayor, the following case *expre Croxall* ‡, before Lord *Hardwicke*, in 1748, is the more interesting. The petition of Mr. *Croxall*, minister of the united parishes of St. *Mary Somerset*, and St. *Mary Mountshaw*, prayed, that the Lord Chancellor would issue his warrant for levying the sums of money mentioned in the petition on several inhabitants of these parishes, who had refused to pay to the minister his dues according to an assessment in 1681.

It depended upon the construction of the statute of the 22d and 23d Car. II. c. 15.

The question was, whether the great seal have an authority under this act, to issue such warrant as is prayed, if the Lord Mayor upon an application to him, refuse to issue one? And the Lord

* 7 Br. P. C. 44. † Vid. App. No. XXXI. ‡ 3 Atk. 639.

Chancellor, assisted by Barons *Bury* and *Price*, determined, that if the Lord Mayor have done wrong in refusing his warrant of distress, for levying sums of money on the inhabitants, who denied the minister his due according to the assessment made in the year 1681, under 22 and 23 Car. II. c. 15. the court of Chancery, upon petition, can issue their warrant for levying the sums assessed.

Act of Wm. 3. for tithe of flax and hemp.

In 1691, 3 Wm. III. c. 3 *. an act was passed *for better ascertaining the tithes of flax and hemp*, by which 4*s*. per acre were to be paid for the tithe thereof, to be recovered as other tithes, with a saving of any land covered by a *modus*. The act was only for 7 years.

7 and 8 W. 3. for recovering small tithes, and taking affirmation of Quakers.

In 1696, 7 and 8 Wm. III. c. 6 †. an act was passed for the more easy recovery of small tithes, which will be hereafter noticed in the 3d book. To the same book may also be referred another act made in the same session, c. 34 ‡. for *taking the affirmation of Quakers, and enforcing the payment of tithes by Quakers.*

In 1700, 11 and 12 Wm. III. c. 16 §. another act was passed for better ascertaining the tithes of hemp and flax, by which the tithe was raised to 5*s*. per acre for 7 years longer.

Tithe of flax and hemp made perpetual.

In 1714, 1 Geo. I. stat. 2. c. 26. an act was passed for a variety of purposes, and by the ‖ 2d section of it the last mentioned act was made perpetual.

31 Geo. 2. for tithe of madder (expired.)

In 1758, 31 Geo. II. c. 12 ¶. an act was passed to encourage the growth and cultivation of madder in that part of *Great Britain* called *England*, by ascertaining the tithe thereof there; by which it was fixed for 7 years at 5*s*. per acre.

It will be here proper to notice the repeal of the before-mentioned act of 3 El. c. 10. and its continuing statutes, by the 10th section ** of the 43d G. III. c. 84, intituled "an act *to amend the laws relating to spiritual persons holding of farms; and for enforcing the residence of spiritual persons on their benefices in England:* and also a qualified opening given to the statute of *mortmain*, for the purpose of extending Queen *Anne*'s bounty, and improving the residences of the inferior clergy, by two successive acts of his present majesty, A. D. 1803 ††. These two acts refer to some others, which with a like view also affected the mortmain act.

* Vide Appendix, No. XXXII. † App. No. XXXIII. ‡ App. No. XXXIV. § App. No. XXXV. ‖ App. No. XXXVI. ¶ App. No. XXXVII. ** App. No. XXXVIII. †† For these 2 acts, vid. App. No. XXXIX.

BOOK II.—CHAP. IV.

Of Prescription, Compositions, Customs, and Moduses.

PRESCRIPTION, according to its general technical import, *is a title taking its substance from use and time by authority of law* *. The time, to which the use is now limited, is from the first day of the reign of Ric. I †. (viz. 6th July, 1189.) This, as before observed, is called the time of memory: and no one can prescribe in any thing, of which the commencement can be shewn since that time. In the common law a *prescription* which is personal, is for the most part applied to persons; being made in the name of certain persons and of his ancestors, or those, whose estate he hath: or in bodies politic or corporate, and their predecessors. For as a natural body is said to have ancestors, so a body politic or corporate is said to have predecessors. Prescription is the generical term, which comprehends customs, compositions, moduses, and all other sub-denominations of things, which may be prescribed in. Prescription what.

CUSTOMS, as they are referable to tithes, and the object of present investigation, are not *personal*, but *local*: they relate to some particular district, place or country: and may not improperly be called *private* common law, or *lex loci*. Customs what.

COMPOSITIONS ‡ are ancient or modern, personal or real: each shall be noted in its order. Compositions what.

A MODUS is a composition time out of mind, the particulars or written document of which being lost, its validity rests upon *prescription*. Modus what.

Although the general conscientious obligation of Christians providing a gospel maintenance for their bishop or particular ministers, to whom they acknowledged spiritual obedience or submission, must have been every where coeval with the adoption of christianity, yet must the commutation or substitution for this christian duty, made by the *civil* magistrate in different parts of the country, have varied in the time of its commencement according to the progress of christianity; and in the nature of its existence, according to the peculiar locality, means, and habits of the inha- Cause of the variety of moduses.

* *Prescriptio est titulus ex non tempore substantiam capiens ab authoritate legis.* Co. Lit. 115. † Co. Lit. 115. ‡ *Holt*, in *Startup* v. *Dodderidge*, 1705, 1 Gw. 591. 2 Salk. *If it were a composition made since* 13 *Eliz. it was void.*

bitants of different districts, over which spiritual *jurisdiction* was committed to a particular bishop, and the subordinate clergy *instituted* by him, to exercise the like *jurisdiction* over different parts of his flock. Hence, and from other intermediate causes, which have been already noticed (such as appropriations, &c.) arose that indefinite variety in the mode, times, and quantity of payment, which prevails in different parishes throughout the country. England had been Christian many centuries before the time of memory: and all the particular customs or modes of payment, or compositions for payment, had then long been in existence; but as at present they must be prescribed for, that is to say, title must be made to them by proving, that they have existed from time, whereof the memory of man runneth not to the contrary, no consideration whatever is to be had of the particular circumstances, grounds or considerations, which gave rise to them respectively. *Prescriptions* then are to the clergy both *active* and *passive*: the clergy prescribes against the laity in many instances, for the payment of tithes in particular places, which are not payable by the common law of the land every where else: and the *laity* prescribes against them for payment of compositions or substitutions of the tithes, which would be otherwise due from them to their parsons by the common law. From these alternate or reciprocal prescriptions arise the chief of those differences, variances, and suits, which have existed between parsons and parishioners since the established laws of tithes have had existence. From the peculiar circumstance of each parish or district, when the parson's maintenance was first fixed, there must necessarily subsist great variety of modes, times, and rates of payment, though all called tithes, throughout the extent of the country, which certainly did not all at once, or under the same circumstances, fix and establish these maintenances for the respective ministers. It is probable therefore, (the verification of the fact would not disturb the principle) that more parishes in England pay tithes under some composition, modus, or other qualification, than broadly upon the common law right of tithing. Hence the importance of the present discussion.

Nothing will more particularly shew the nature of an ancient composition, than the petition of the inhabitants of the town of *Liskeard*, in Cornwall, to parliament, and the answer to it.

Petition of the town of Liskeard, 1314, about an ancient composition for tithes.

Rot. Parl. 8 Edw. II. No. 97. A. D. 1314 and 1315. "To "our lord the king and his council, shew, his tenants of his town "of Liskerede in Cornwall, that whereas King Richard of Ger- "many, formerly Earl of Cornwall, granted to them in fee-farm,

" his town of Liskerede aforesaid, with the mills of the town, " rendering therefore yearly 18*l.* 18*d.* and half a mark to the vicar " of the said town, and that to be in satisfaction of the tithes of " the said mills; and that the said tenants should not be any more " charged against their warranty, the said King Richard gave 8*s.* " of rent to the prior of Launceston, parson of the said town of " Liskerede, at the request of the said prior and vicar, who then " covenanted that it was the established payment for tithes for " ever; from which time till now the said farmers have paid the " half mark to the vicar, and the king's provost of his manor of " Liskeard has paid the 8*s.* to the parsons of the church; but now " lately John Launseles, vicar of the said town, notwithstanding " the composition made between the King Richard of Germany, " and the vicar's predecessors above named, came and demanded " of them the tithes in kind, whereas by the aforesaid composition " he ought to have only the demy mark, and the prior, the parson, " the 8*s.* to the disherison of the king, and to the charge of the " town aforesaid; and upon this the Bishop of Exeter has excom- " municated them, and interdicted their church, and condemned " them; whereas they can neither charge nor discharge themselves, " nor prove the said composition, nor put it in judgment without " the king and his council; wherefore they pray remedy."

" *Answer.*—Let Hugh de Courteney, John de Foxle, and John " de Westle, or two of them, so that the said Hugh be one, be " assigned to enquire in the presence of the parties of the tithe " within written, to wit, how much tithe hath used to be given " for the mills, &c. at the time when it was in the hand of King " Richard of Germany, and whether there be a composition " thereof or not, and of the other articles, &c. and let them return " the inquisition before the Treasurer and Barons of the Exchequer, " and let there be done thereupon there what justice shall advise; " and let there be a writ to the bishop, commanding him, in the " mean time, to supersede the execution to be done against the " men of Liskeard, of those things, which were drawn in plea " before him concerning the said tithe, and in the mean time to " revoke also the sentence, if any should have been denounced " against them in that case." Answer thereto.

Lord Chief Justice *Holt*, in the before-mentioned case of *Startup* v. *Dodderidge*, 1705, which turned upon the validity of a composition, thus spoke: " Upon the face of it, it appeared plainly to be nothing but an agreement between the parson and the parishioners; if it were an ancient composition with the consent of the

What formally constituted an ancient composition.

patron and ordinary, before the 13 Eliz. c. 10. that would bind the parson; but then that was no ground for a prohibition, being it might be pleaded and tried below in the ecclesiastical court. That there had been formerly prohibitions granted upon suggestions of compositions, and that there were old cases to that purpose; but that it had been held otherwise since; which *Powell* agreed. But if it were a composition made since 13 Eliz. it was void. He said, that a *composition time out of mind was a modus.*"

Parol agreement or composition for tithes.

Even a parol agreement is a species of composition for tithes: and a prohibition shall be granted, where a parson libels against his own agreement *. So a parson grants to his parishioners by parol, that they may have their tithes by way of retainer for three years; and this was holden good. But otherwise it is, if the agreement had been to have or retain them, as long as the parties shall live, or even for a long term of years, which sounds in nature of a lease †. The court of Exchequer in *Keddington* v. *Adamson* 1716 ‡, came to the following resolution. A question was made, whether the above agreement, by parol, being for three years, were good in law, so as to bind the rector and the plaintiff §; and, upon debating thereof, many reported cases relating to the same, were cited, and the cause was ordered to stand over to the next day; on which day council on both sides were again heard; and after many arguments thereupon, it was ordered to stand further over, the court not being ready to give their opinion thereon; and on the cause coming on again, the court declared, that the agreement made with the above defendants for the tithes, for three years, was good and valid in law, and ordered them to pay accordingly. But where there was a composition ‖ between parson and occupiers, and the money paid and accepted during the incumbent's life, yet, upon his death, the successor may sue in the Exchequer, without notice, that he refuses the composition; because it determined by the death of the incumbent, who made it, and the successor may continue

* *Chapman* v. *Hurst*, 1 Leon. 151. A. D. 1589.

† *Hawkes* v. *Brothwith*, A. D. 1606, Yelverton 94, same case 2 Cro. 137. So also *Tanner* v. *Small*; *Nelson* v. *Prettiman*, and *Rolls* v. *Rolls*, quoted *ibidem*. Also vide Hobart 176. ‡ 2 Wood 49.

§ Bunbury, in his report of this case, says, that it was held by *Bury* and *Price*, Barons, that a composition, by way of retainer by parol, can be good only for one year, being by way of contract; but that a lease of tithes even for one year by parol would be void. *Montague*, Baron, seemed to be of opinion, that an agreement between the parson and his parishioners, for a year, by parol, would be good, though not for life, being only an agreement, that he will not sue the parishioners for so many years for tithes. S. C. Bunb. 2. But see 4 Bacon's Abr 54, notes, 5th edit.

‖ *Brown* v. *Barlow*, 1729, 3 Gwil. 1001, MS.

or waive it at his election. But if, upon coming to the living, he accept the composition, that will amount to a confirmation, so far as to oblige him to give notice of his renouncing it, and demanding tithes in kind, before he brings his bill there: otherwise, the occupier, making a tender of the money before the commencement of the suit, and offering by his answer to pay it, shall not be liable to costs, but in most cases will be entitled to his costs from the parson, if he rely on the tender for his defence.

No composition binding since the 13th Eliz.

It was before observed, that by the case of *Lloyd* v. *Mortimer*, 1775, before the lords, that an agreement by deed or modern composition since the 13 Eliz. although acquiesed in above 100 years, was not binding on succeeding incumbents. Nay, even the confirmation of such a composition by a decree of the court will not render it binding upon future incumbents, as we see by the case of *Jones* v. *Snow* *, 1780, where to a bill for tithes in kind the defendant pleaded, in exemption, an agreement between a predecessor of the plaintiff and the parishioners, confirmed by a decree in Chancery. The agreement, which was in 1652, was for the division of common fields in Tidmington, in which a part was to be given in lieu of glebe. A bill was filed by the lord of the manor to carry it into execution, stating the rector's claim, and his requisition of a money payment in lieu of tithes. The decree was made by consent of all parties. In answer it was said shortly and cogently, that in the *Attorney General and Blair* v. *Cholmley*, Ambl. 510. Lord Northington determined, that such a decree was not conclusive upon the rector, and that decree was confirmed upon appeal. Thus the law is settled. But it has been insisted, that the present case differs from the case cited. One point of difference insisted upon is, acquiescence. But that has no weight, nor does any acquiescence appear after the plaintiff knew his right. There is no difference between this case and that of the *Attorney General and Cholmley*, therefore the decree must be the same †.

Ancient composition and modus the same thing.

In the case of *Ekins* v. *Dormer* ‡, A. D. 1747, Lord *Hardwicke*, speaking of compositions, said, "I do not know the absolute "distinction between an *ancient composition* and a *modus*; there may "be a difference between a composition, that is not beyond the "memory of man, and a *modus*; but unless something be shewn, "that breaks in upon the immemorialness of it, it is synonymous "with the *modus*.

* 3 Gwil. 1199.

† To the like purport was the case of *Cartwright* v. *Cottin*, A. D. 1779, 4 Wood 88.

‡ 3 Atk. 535.

Difference between a modus and a real composition.

"There is, indeed, a difference between a real composition and "a *modus*; for a real composition is when an agreement is made "with a parson or vicar, with the consent of the patron and ordinary, that such lands for the future shall be discharged from "the payment of tithes in specie, by reason of a recompence "made to the parson or vicar for them out of other lands; but "a *modus* is nothing more than an ancient composition between a "lord of a manor, and the owners of the land in a parish, and "rector, which gains strength by time." The same learned lord, two years before that time, in * *Ekins* v. *Pigott*, 1745, laid down a difference between a personal payment upon a composition, and a composition, and a *composition real*, which latter is some charge given to a parson upon lands, under a deed, to which himself, the patron, and ordinary, are parties. And in the *Attorney General* v. *Bowls and others*, † A. D. 1754, his lordship further explained what he meant by a real *composition*, which "does not mean any "substantial permanent security for the payment of the compo-"sition, but land substituted in lieu of tithes."

Production of the deed necessary to prove a real composition.

It appears from very early determination, that tithes in kind were every where due, unless there were a *composition real*, or a good prescription in *modo decimandi* ‡. And as to the proofs of such real compositions, it was agreed to in the court of Chancery, in *Heathcote* v. *Manwairing*, A. D. 1791 §. That in the cases of *Robinson* v. *Appleton* ‖, A. D. 1777, and in *Hawes* v. *Swain*, Exchequer sittings after Trinity, 1789, it was settled, that a composition real could not be established without shewing the deed, by which it was created, or proving the actual existence of such a deed; for, otherwise, every bad *modus* would be set up as a real composition, and there would be no line drawn between them. And A. D. 1793, in the Exchequer, in *Sawbridge* v. *Burton* ¶, the rector, it seems, relying on the inability of the defendants to prove the deed of *real composition*, filed his bill for tithes in kind, after an acquiescence in the exemption by his predecessors of 400 years, and by himself of 33 years, (upon which the Chief Baron remarked how unfavourably he came before the court) to which the defendant pleaded a *composition real* of 20*s*. per annum, in lieu of all tithes for *Thundersly* Park. The original composition could not be proved, though letters patent referring to it were produced; and an *inspeximus* had been granted temp. Hen. VIII. Upon which Lord Chief Baron *Macdonald* said, "The plaintiff

Common law right of tithes barred by no lapse of time within memory.

* 3 Atk. 298. † 3 Atk. 806. ‡ Tothill, 284, *Southby* v. *Moore*, A. D. 1612. § 3 Br. C. C. 217. ‖ 3 Gwil. 1101. MS. ¶ 2 Anst. 378.

"the rector of the parish, rests upon his common law right of "tithes, and accordingly the *onus* of proving something contrary "to that right, is thrown upon the defendant. To establish a "composition real, he has not been able to produce the deeds "executed by the parties at the time, but has shewn evidence, "from which it may be inferred that such deeds did once exist.

"In the 20th Hen. VIII. the rector claimed an *inspeximus* to "confirm the former grant; this proves the composition to have "been then advantageous to him. It was an application by a "simple individual for mere justice against the crown, and we "must presume, that he did not succeed in that application with-"out fully proving the right. We have here then two of the "necessary parties to a composition real.

"The production of the deeds, by which all the parties con-"sented, is not necessary. In the case of the crown itself, letters "patent have often been presumed from length of time, (Cowp. "109.) So in *Bedle* v. *Beard*, 12 Co. 4, a grant of the king "was presumed in order to support an ancient impropriation; and "Lord *Ellesmere*, admitting the objections to the apparent title, "yet held that after long possession the title should be presumed. "So very unwilling was that great judge *quieta movere*. So the "case of *Grimes* v. *Smith*, 12 Co. 4, in establishing an endow-"ment of a vicarage, common recoveries are often supported, "though the right of the tenant to the præcipe do not appear. "1 Vent. 257. 2 Str. 1129, and the case of *Hasselden* v. *Brad-"ney*, cited by Buller, J. 3 Term Rep. 159, and the bill was dis-"missed with costs."

Prescription may be either in *non decimando* or in *modo decimandi* To prescribe in *non decimando* is to make title to be exempt free or discharged from payment of tithes without allowing any recompence for the same to the parson: and the general *common law rule* is, that no layman can prescribe in *non decimando*. The only title, which can be set up by laymen to this exemption, or a *non decimando*, is to derive it under statute from some religious person. So in rather a recent case, A. D. 1762*, *Breary* v. *Manley*, in the Exchequer, upon a bill by the rector of Middleton, in the *Woulds* of Yorkshire, for tithes in kind of parts of his parish. The defendant pleaded that part of his farm had been time out of mind exempt from payment of tithes of any kind, or any *modus* or compensation

Prescription may be either in modo decimandi or in non decimando.

* 3 Wood 43, 2 Burn. E. L. 278. Dr. Burn first published this case in 1763, in his *Addenda* to the quarto edition, which came out in that year.

in lieu thereof; and by his witnesses proved, that no tithe, *modus*, or compensation had within the memory of man been paid for such part of his farm.

Exemption in *non decimando* must rise out of some special cause.

The court, at the hearing of the cause, were clearly of opinion, that the mere non payment of tithes for time immemorial would not be an exemption from payment of them, without setting out and establishing such exemption to have arisen from the lands having been parcel of one of the greater abbies; and therefore decreed the defendant to account for the tithes of that part of his estate, for which he claimed the said exemption *.

No prescription in *non decimando* against a lay impropriator any more than a spiritual rector.

It makes no difference, whether the rector so claiming tithe be clerical or lay: for in the case of Lady *Charlton* v. Sir *Blunden Charlton* †, 1732, Lord Chief Baron *Reynolds* declared it as his opinion, there could be no prescription in *non decimando* against a *lay* rector, any more than against a *spiritual* rector, and that they were equally intitled to tithes of common right; and that it was sufficient for a *lay* rector to set forth in the bill, that he was seised of the *impropriate rectory*; and if he made out his title to that, it would be sufficient, without putting him to the proof of having received tithes; and to this opinion Baron *Comyns* seemed to assent. But note, he distinguished between one, who set up a title to the rectory, and one, who entitled himself only to the tithes, or any species of tithes within a parish: for in this last case the plaintiff shall be holden to strict proof, not only of his title, but also of the prescription of all other tithes he sets up a title to. And in this present case, the plaintiff having set forth a title in Sir *Francis Charlton*, (under whom she claimed) to all the tithes in the parish of Ludford, (except such small tithes as the vicar usually received) and not to the rectory; and the defendant denying the plaintiff's title to the tithe herbage, and the plaintiff not being able to prove any herbage tithe ever paid, though she attempted to prove the unity of possession for above seventy years, the bill was dismissed.

This question set to rest by Lord Chief Baron Macdonald, 1796.

In 1796, in *Nagle* v. *Edwards* ‡, Lord Chief Baron *Macdonald* set this question entirely at rest. The plaintiff having made out a clear title to himself as rector, the defendant insists on exemption from payment of hay and agistment tithe, on the ground of having never paid these tithes; from non-payment he wishes the court to presume a grant or conveyance of these tithes from the lay impropriator. It is clear that, against an ecclesiastical rector, this defence could never be set up in any shape. Whether a *lay* impro-

* *Nash* v. *Thorn*, 1789. 4 Gwil. 1324. † Bunb. 325. ‡ 3 Anst. 702.

priator should have the same benefit was at first doubted, but that point seems now at rest. Three successive decisions upon it have fully established, that there is no difference between a *lay* and an *ecclesiastical* rector. *Benson* v. *Olive*, in 1730; *Charlton* v. *Charlton*, in 1732, and the *Corporation of Bury* v. *Evans*, in 1739.

How Laymen are to derive their title to the exemption.

As laymen then can now prescribe in a *non decimando*, it remains to be seen, how they can derive their title to this privilege of exemption, which many throughout the country are known to enjoy. But for the better opening and reconciling the mind to the enjoyment of these legal rights and indulgencies of some of the laity, it will be proper to resort once more to the effects of that great and important act of the civil power under Henry VIII. which *unspiritualized*, (if I may be allowed the phrase) so large a part of the church property, by redeeming it out of *mortmain*, and restoring to it the life and circulation of all other lay property. In so doing the *civil magistrate* thought proper *(jure an injuriâ*, the clergy, who were the losers by the measure will decide,) to defalcate from the quantity, though he would not in any shape break in upon or alter the quality of what had been or what was to remain the ecclesiastical fund. So deeply had the system of tything pervaded the whole mass of landed property, that whether the whole or a part only remained in *mortmain* the redeemed as well as the unredeemed part thereof was by the legislature left cloathed with the same qualities of indulgence or privilege, in secular as in clerical or religious hands. The intent of the legislature was to diminish the *quantum* of property formerly possessed in *mortmain* by churchmen, not to alter the nature of that, which they left to them, or which they took from them.

The title to exemption derived under 31 H n. VIII.

The first case upon prescribing in *non decimando*, which I find in the books, is that of *Nash* v. *Molins* *, A. D. 1590, by which it was laid down, and the doctrine has never since been deviated from, *that a spiritual man may prescribe in non decimando*, and by the before-mentioned statute of 31 Hen. VIII. the king shall hold it discharged, as the prior held it. And if he held it discharged, no matter by what means: for it shall be intended by lawful means. Nearly about the same time, A. D. 1596, another very important case was decided, which settled this point, (though much of the case turned upon the pleadings,) it is generally called the Bishop of *Winchester's case*: it was between *Wright* v. *Wright* †,

* Reported by Croke El. 206; but more largely by Leonard, 241.

† It is reported by Cro. El. 511. More 452. 2 Rep. 43, and most largely by Sir Henry Gwillim from a very valuable note in Mr. Hargrave's collection. 1 Gwil. 167.

and as much of it as concerns this question, viz. that laymen as tenants at will, or for years, to *spiritual persons*, may also prescribe in *non decimando*. Lord Coke, who was council in the cause thus speaks. " That Stephen Gardener, Bishop of Winchester, the 4th day of July, 38 Hen. VIII. was seized of the manor of *Eastmean*, in the county of Southampton, in the right of his bishoprick; and that the said bishop and all his predecessors of the said bishoprick, seized of the said manor, had holden and enjoyed the scite of the said manor, and all the demeans of the said manor, *a tempore cujus*, &c. for him, his tenant, and farmers, for years or at will, *exonerat ac quietat et privilegiat de et a solutione decimarum quarumcunque de, in vel super præd' scit' et terr' dominic et qualibet seu aliquâ inde parcel' annuatim quovismodo per totum tempus præd' crescent contingent sive renovant!* And the plaintiff conveyed to himself an interest for years, for parcel of the said demeans of the said manor, by the demise of the said bishop. In this case three points were moved: 1st, whether the said prescription for discharge of tithes were good or not. 2nd, Whether the plaintiff, being a layman, should take benefit thereof. 3rd, Whether the said traverse were good or no. And as to the first point, three things were considered: 1st, who were by the common law capable of tithes in pernancy, and who not. 2ly, Who was capable of a discharge of tithes at the common law, and who not. 3rd, How he, who was capable of a discharge, might be discharged of tithes, *scil.* either by *prescription* or by *composition*, &c.

The special grounds on which laymen can establish a prescription in *non decimando*.

As to the first, it was resolved, that none by the common law had capacity to take tithes, but only *spiritual persons*, or a *mixt person*, and regularly no meer layman was at the common law capable of them, unless in special cases; for no layman but in special cases, could sue for them at the common law in the spiritual court, *scil.* for the substraction of them. See the books in 7 E. III. 5. 11 As. 9. 44 E. III. 5. b. 10 H. VII. 18. and 7 E. VI. Dyer 84. and the books in 43 E. III 34. a. and 44 E. III. 39. a. b. that a farmer of a parson may sue for tithes; but it appears, that such farmer was a spiritual man, as vicar, &c. and so it was said by some, are all the other books in 31 H. VI. 11. a. 35 H. VI. 39. a. b. 2 E. IV. 15. a. b. 6 E. III. 4. a. b. 12 H. VII. 24. b. (in which in truth there are but opinions) to be intended; and if the common law had generally enabled a layman to be capable of tithes, the common law would have given him remedy for the recovery of them; but regularly a *layman* had no

remedy for the substraction of tithes, 'till the statute of 32 H. VIII. cap. 7. But see 2 As. 75. that the king was capable of tithes at the common law, for he was *persona mixta*, and his patentee also by his prerogative, as there appears.

As to the second point it was resolved, that a mere layman, who was not capable of tithes in pernancy, was notwithstanding capable of a discharge of tithes at the common law in his own land, as well as a spiritual man; for by the common law, the parson, patron, and ordinary might have discharged a parishioner of tithes in his land, &c. or the parishioner might have given part of his land to the parson for a discharge of tithes in the residue. And for the proof thereof see the book in 8 E. 4. 14. a. b. and Register 38. where it appears, that a layman might be discharged of tithes at the common law; but a layman might be discharged of tithes at the common law by grant or composition, as it appears in the said books, but not by prescription to be discharged of tithes; for it is commonly said in our books, that he may prescribe *in modo decimandi*, but not in *non decimando*, and the reason thereof is because he is not, but in special cases, capable of tithes at the common law, and therefore without special matter shewn, it shall not be intended that he hath any lawful discharge.

How the patentees of abbey lands discharged of tithes.

In another case, 1614, *Cotes and another* v. *Warner* *, Sir Henry Warner prescribing in like manner as patentee of the manor of Milnall, belonging to the late Abbot of St. *Edmond's Bury*, for his farmers, tenants, &c. to be discharged of tithes, the court seemed to think, that if it had appeared upon the record, that they were tenants to the lord of the manor of Milnall, then they would have been discharged within the prescription.

We have before noticed the great leading case of *Sydown* v. *Holmes*, A. D. 1635, but it was with reference to its bearing upon the two statutes: viz. 27 and 31 Hen. VIII †. "The report of that case by Sir Wm. Jones (it is a better report of it than that by Sir Geo. Croke) throws much light upon the subject. Of the two points made in that case, the first was this. A priory holds lands exonerated of tithes by prescription, the lands come to the hands of a layman, afterwards, the priory is dissolved: whether the tenant of these lands shall have the benefit of this prescription without the aid of any statute or act of parliament? The second question was, whether lands of an abbey, which came to the king by the statute of 27 Hen. VIII. and were exonerated of tithes in the

* 1 Gwil. 272, from Calthrops MS. † Sir Wm. Jones, 368. Cro. Car. 42.

hands of the prior by prescription, shall be exonerated in the hands of the king, or his patentee, by the statute of 27 Hen. VIII. or the statute of 31 Hen. VIII?"

3 modes of exemption from tithes.

"As to the first point, all the judges unanimously resolved, that there were three manners of discharge from tithes without the aid of the statute, viz. 1st. by privilege or bull; 2d. by real composition and prescription *in modo decimandi*; 3rd. by general prescription in *non decimando*. The first, namely, by privilege, was confined to the Templers, the Hospitallers, and Cistertians, who were exonerated by a general council (as it seems;) for it is said by Panormetan, *capite de decimis, quod privilegium non solvendi decimas datur in apice juris canonici cistersiensibus hospitalariis, et templariis solummodo et non aliis monachis quibuscunque:* 2d. Several abbies were discharged by the pope's bull, sometimes granted to an order, as to the *Premonstratenses*, or to a particular abbey. These were personal privileges, *et omnia personalia privilegia* (as *Panormitan* there saith,) *certam habent interpretationem, et non transeunt de unâ personâ ad aliam.* If therefore a corporation, which had such a privilege was dissolved, or its lands were granted over to another, the privilege was gone, and the grantee or feofee of the lands must pay tithes."

1st. Privileged orders by privilege or bull.

2d. By real composition.

"The second discharge is by real composition. This, as it appears in the Register 438, and F. N. B. 41. 43. is, when a sum of money, or lands, are given to a person by the assent of the patron and ordinary, in recompence of all manner of tithes; there the land is discharged of tithes *in specie*, and the modus is made tithes: and if the lands are transferred or granted to another, the feoffee or grantee shall have the benefit of it: and upon the ground of a real composition, a *modus decimandi* by prescription is maintainable upon a presumption, that there was a real composition, which is lost, F. N. B. 41. Regis. 38. 8 E. IV. 14. and 2 Rep. *Bishop of Winchester's Case:* and of such a prescription any one, who has the land, shall take advantage.

3d. By prescription, of which spiritual persons only are capable by common law

The third is a discharge in *non decimando*, either *in specie* or otherwise by prescription, of which an ecclesiastical person only was capable, as appears in the Bishop of Winchester's case: for a layman, by the council of Lateran, was not capable of tithes either in *pernancy*, or in discharge; but an ecclesiastical person was capable of both, and was not bound by that council."

Berkeley held the privilege to be merely personal.

"Thus far all agreed; but *Berkeley* went farther, and said, that the prescription must be intended to have been either upon a privilege, or upon a real composition before time of memory. Pri-

vileges were the more frequent; the other was rare: in the present case, therefore, it must be presumed, that it was founded upon a privilege in the beginning; and if so, it will follow the nature of the beginning, namely, a privilege; and all privileges, as was said before, were personal, and were extinct with the person, and therefore the prescription shall be extinct. And so he held, that in this case the prescription was personal, and extinct by the dissolution of the corporation, and could not be extended to the king or his patentee.

Croke held privileges to be grounded in composition real.

And Croke agreed, that if it must be presumed to be upon the ground of privilege, that then it was gone; but he said, that it shall be presumed to be upon a real composition: and then the tenant of the land shall have benefit of it. But he gave no reason to shew, that such presumption ought to be made.

3 justices against Croke held the privilege gone by the dissolution of the abbey.

Jones agreed to the ground taken, namely, that if the prescription shall be intended to be upon the idea of a privilege, then the prescription was gone, and determined with the person. And Brampston agreed to this, and that it was a stronger presumption than that it was grounded on a real composition. And *Jones* insisted, that it should not be taken to be upon a real composition; for though a prescription *in modo decimandi* by payment of a sum of money was good upon intendment that it was grounded upon a real composition for the payment of the sum is good evidence of that; yet in a *non decimando* this does not hold; and so it is resolved in the Bishop of Winchester's case, 2 Rep. and *Brampston* and *Jones* said that there might be an intendment of another sort of the commencement. It is said before, that ecclesiastical persons were capable of tithes in pernancy, and of an exoneration from the payment of tithes, and were not bound by any canon or council. That, therefore, may be the commencement of the prescription; and if so, it is personal, it is tied to the church, *et non egreditur personam:* when therefore the land comes to the hand of a layman the prescription is gone. *Jones* added, that inasmuch as a layman is not capable of a prescription *in non decimando* in himself nor in his ancestor, he cannot be capable in *a que estate.* So that three justices held, against the opinion of *Croke*, that the privilege of prescription was gone by the dissolution of the abbey."

A copyholder of a bishop's ma-

It was adjudged, A. D. 1599, in * *Crouch* v. *Frier*, B. R. that a copyholder of an inheritance of a bishop's manor may, through

* Reported by Cro. El. 784, 1 Rol. Ab. 653, Yelv. 2, Noy 132, More 618.

nor may through him prescribe *in non decimando.*

him, prescribe in a *non decimando:* for his lands are parcel of the demesnes of the manor, and this might have begun upon a real composition for the whole manor.

Ecclesia non solvit eccle-siæ.

It is observable how strongly the courts have ever inclined to keep up the prescriptive rights *de non decimando*, in, from, and through the clergy, upon the maxim of *ecclesia non solvit ecclesiæ*: for in 1590, in the case of the *Bishop of Lincoln* v. *Cowper*, in B. R. * This prescription, though stated to have been interrupted, was admitted to exist in a bishop by revival on the reconveyance of lands formerly belonging to the bishop. "The Bishop of Lincoln sued a prohibition against Cowper, who had libelled against him in the spiritual court for tithes out of the manor of D. And the bishop did suggest, that he and all his predecessors had been seized of the said manor, and that as long as it was in their possessions, had been discharged of tithes, and shewed, that in the time of E. VI. the said manor was conveyed to the Duke of Somerset in fee, and afterwards was regranted to the bishop and his successors; it was moved, that the prescription was not good, because *de non decimando:* and admitting that the prescription be good, the same is interrupted by the seisin of the Duke of Somerset, and although that the manor be reassured to the Bishop of Lincoln, yet the prescription is not revived: as homage ancestrell if it be once in a foreign seisin, although it be reassured, yet it is not revived. But by *Wray, Gawdy, and Fenner*, the prescription is good in the case of a spiritual person, but not in the case of a common person. And they all were clearly of opinion, that the prescription is not gone by this interruption; for tithes are not issuing out of the lands, neither can unity of possession extinguish them, neither are they extinguished by a release of all right of land, &c. See for this, Co. 11. part of his reports in the case of *Pridle and Naper.*"

Variance of the old cases as to the exemption of lands of the privileged orders.

The old cases relating to the discharge of *abbey lands* are much at variance: it appears however to be now the settled doctrine, (for in such cases we must abide by the latter judgments) that the lands of the privileged orders are discharged of tithes whilst in the manurance of the owner, though such lands were in lease at the time of the dissolution of the abbies. It would be useless to notice the different cases, which are now overruled by the judgment of the Exchequer in 1787, in *Cowley* v. *Keys* †, to a bill by the rector for the tithes of a particular parish, the defendant being the

* I give this case from 1 Leonard 248, as more explicit than Croke's report of it, Cro. El. 216.

† 4 Gwil. 1308, from a MS. of Mr. Cox.

owner and occupier of the said farm, by his answer insisted upon the following exemption: that the said farm called Longwyke, was heretofore part or parcel of the possessions of a certain abbey or monastery of St. Mary in *Coggleshall*, in the county of Essex, which abbey or monastery was of the Cistertian order, and founded by King Stephen and his consort Queen Matilda, in 1142, and afterwards surrendered or dissolved in the 29th year of the reign of King H. VIII. that the said abbey and the farm and lands thereunto belonging, had been, and were previously to, and at the time of the surrender or dissolution thereof in the manurance and occupation of the abbot and convent of the said abbey or monastery, and that the same were exempt and discharged from the payment of tithes of the said lands by reason of the said order, and, especially, of the said lands so holden in the manurance and occupation of the said abbot and convent: that by a surrender, bearing date the 5th day of February, in the 29th year of the reign of H. VIII. the abbot and convent of the said abbey of *Coggleshall*, (being one of the greater abbies, and of the yearly value of 251*l.* 2*s.*) surrendered all the estates and possessions (including the farm and lands before-mentioned belonging to the said abbey to the crown, which surrender was afterwards (among divers others) confirmed by the act of parliament made and passed in the 31st year of the reign of H. VIII. for the dissolution of monasteries and abbies: that the lands so occupied and manured by him (the defendant) were at the time of the surrender thereof to the crown acquitted and discharged, and free from the payment of any tithes whatsoever: that by letters patent, bearing date the 17th day of July, in the 35th year of the reign of H. VIII. the king granted (among other things,) all that his manor or grange of *Tollesbunt Major* and *Longwyke*, in the county of Essex, with the rights, members, and appurtenances lately to the monastery of *Coggleshall*, belonging to Stephen Beckingham, and Ann his wife, to hold to them the said Stephen Beckingham, and Ann his wife, their heirs and assigns for ever: that by virtue of several mesne conveyances the defendant derived a title to the said farm and lands, which were then in his manurance and occupation, under and from the said grant to S. Beckingham and Ann his wife, and by virtue thereof the defendant was then seized of the said farm and lands, and was the absolute owner thereof, he having purchased the same for a valuable consideration, some time in the month of April, 1783; that he took the said farm and lands into his own manurance at Michaelmas, 1783, and that he had ever since been in the occupation and manurance thereof

The old cases overruled by the decision of Exchequer in 1787, in *Cowley* v. *Keys*.

for his own use, and therefore insisted, that so long as he should continue in the occupation and manurance for his own use, he was not, and should not be liable to the payment of any tithes for the produce of the said lands, or any composition in lieu thereof.

The council of the plaintiff insisted, that from the several instruments, which had been produced, it appeared, that at the time of the dissolution of the greater abbies, these lands were not in the actual occupation of the abbot and convent, but were under lease to some other persons, and were not therefore within the saving of the statute. And upon this subject, Mr. Scott, (the late Chancellor) for the plaintiff observed, that the words of the statute of 31 H. VIII. c. 13. and 21. were, that *as well the king, his heirs and successors, as all and every person and persons, their heirs and assigns, which have, or hereafter shall have any monasteries, abbathies, &c. or any manors, messuages, &c. which belonged or appertained, or which now belong or appertain unto the said monasteries, &c. shall have, hold, retain, keep, and enjoy the said manors, &c. according to their estates and titles discharged and acquitted of the payment of tithes, as freely and in as large and ample a manner as the said late abbots, &c. or any of them had, held, occupied, possessed, used, retained, or enjoyed the same, or any parcel thereof, at the days of their dissolution, suppression, &c.* These words are very precise and strong, and evidently confine the exemption to the lands actually in the occupation of the abbey at the day of the dissolution. Now the lands at present in question appear not to have been exempt from payment of tithes at the day of the dissolution; for, being under lease to the farmers of the abbey at the time, they certainly were liable to the payment of tithes, while in the occupation of the farmer, although the exemption would return with the lands to the abbey itself. And the case of *Lord* v. *Turk*, (Bunb. 122,) which is the last of the printed cases on this subject, authorizes this construction. *Wooddeson* on the same side observed, that the construction contended for by the plaintiff is certainly a literal and strict construction of the statute; but is it right so to construe a statute, which so materially tends to the impoverishment of the church? The author of these exemptions was Pope *Paschal* II. who exempted generally all the religious from paying tithes of lands in their own hands. This privilege was afterwards restrained to the four favoured orders. So it continued till the 4th council of Lateran, in the year 1215, when the privilege was restrained to such lands, as the abbies had at that time,

and was declared not to extend to any after-purchased lands. And it extended only to lands *dum propriis manibus excoluntur*, Decret. tit. 3. tit. 30. c. 10. Then came this singular restriction on the Cistertian order, who had contrived to extend this exemption to their farmers, upon which the statute of 2 H. IV. c. 4, and 7 H. IV. c. 6, (already noticed) to restrain this practice of purchasing exemptions, and to prevent such exemptions as had been purchased since the fourth council of *Lateran* from being carried into effect. And so it remained to the time of the dissolution.

Simeon on the same side, contended, that from the nature of the privilege *ratione ordinis*, compared with the words of the statute, it seemed, that this was not a case within the exemption of the statute. For though the statute applies to all cases of real exemptions, yet it will not apply to personal ones. And the words of the act particularly chosen to extend only to such lands, as were at the time in the actual possession of the abbey; the words, "*have, hold, occupy, possess, use, and retain, and enjoy*," being express words of possession, and properly applicable to that only. It is true, if the lands had happened to be in manurance of the abbey at the time, the king would have had the benefit of the existing exemption, but they being in other hands, and the personal privilege being thereby suspended, how can it be within the words of the statute? That which did not exist could not be continued. Nothing is said about the revivor of any privilege; but merely the continuance of an existing one. Nor does the act say, the king shall hold in as large a manner as the abbey might have holden, but merely as they did hold. And as they most certainly did not then hold discharged of tithes, there was no exemption to be protected by the statute. The only authority on the other side is the case of *Porter* v. *Bathurst*, Cro. Ja. 554, 559; but the case of *Lord* v. *Turk* in Bunb. is at least of equal authority. And in Hob. 296, the words of the pleadings are *quamdiu in propriis manibus excoluntur*, which, being a case of pleading in prohibition, is of considerable authority.

The council for the defendant perceiving the opinion of the court to be with them on the present point, did not argue it much, but observed, that the case in Cro. Ja. which was also in Palm. 118, appeared to be a case of considerable weight and authority. And Selwyn added, that in the case of *Bennison* v. *Smith*, 11 Geo. III. in the Exchequer, Parker, C. B. said he had seen Baron *Price's* MSS. notes of *Lord* v. *Turk*, by which the case appeared to be much misreported by *Bunbury*.

Lands formerly of a Cistertian abbey discharged of tithes whilst in the manurance of the owner, though such lands were in lease at the time of the dissolution of the abbey.

Lord Chief Baron *Eyre*.—" If the court were inclined to determine the present question in favour of the rector, the case should stand over, that we might have an opportunity of giving it more consideration. But as we think at present on this part with the defendant, we see no reason to postpone directing the issue, which we think necessary to be tried on the other part of the case. If that issue shall be found for the defendant, then the rector will have another opportunity of discussing this point; so that he is not absolutely concluded by our present opinion. The case in Cro. Jac. is a case of great authority, determined on a special verdict in prohibition, and I greatly prefer such a determination in prohibition, to any decision in a court of equity in a collateral way. The question in the former mode is pointedly on the record: there is an opportunity of appealing; and the ground of the decision is distinct, and not to be misunderstood. But, if there had been no such case to be found, we should have been of the same opinion, seeing what has been the current of determinations on other branches of the statute. We have nothing to do with the policy of the laws, we must take it as we find it: our business is only to expound the law. With regard to the observation, which has been made on the words of the act, '*have, hold, occupy, possess, use, retain, and enjoy*,' I do not see, that these words can be restrained so, as to pass only a possessory right; and if they did, they must have the same effect in the case of real exemptions, which is admitted by the counsel to be otherwise. Indeed, '*have and hold*,' are words constantly made use of to convey the largest estates, and do not apply merely to manurance. That being the true construction, the only argument of weight seems to be, that this species of privilege was not only personal, but one that could not be said to be *in esse* at the time of the dissolution; and if not *in esse*, it could not be continued, and therefore was not a subject of the provision of the statute. But I cannot doubt of the existence of this privilege at the time of the dissolution; not indeed in point of benefit, but in point of right. It is admitted, that the privilege is not destroyed by the lands going out of the hands of the abbey, for it returns to them with the lands. It is only suspended in point of benefit, but is never gone out of them in point of right. The case in Cro. Jac. seems to be quite right, and the case of *Lord* v. *Turk* *, in Bunb. to be determined without due considera-

* The case of *Lord* v. *Turk*, as reported by Mr. Bunbury, is as follows: Bill by the vicar of *Tisbur.t*, in the county of Sussex, for tithes. The defendant insists, that the lands were parcel of the monastery of Robertsbridge, which was of the *Cisterthan* order,

tion, and I therefore cannot lay any stress upon it against the obvious interpretation of the statute."

Within 5 years of this last determination, Lord Chief B. *Eyre* further laid down the law of owners of abbey lands prescribing *in non decimando*: for in 1792, in *Clavil* v. *Oram* *, he thus spoke, "This is a bill by an impropriate rector for tithes in *Bradford*, in the county of Wilts.

"The title is proved, and therefore he has the common law right.

"The defendants have set up a defence, and we are to pronounce, whether it is sufficient for a decree or an issue.

Where laymen can make title as representatives or derivatives of abbots privileged they may prescribe *in non decimando*.

"The defence is in two parts: the lands they occupy, they say, are part of the chapelry of *Atworth*, and that this is part of the manor of *Bradford*, within the parish of *Bradford*, and that their lands were formerly part of lands of the dissolved monastery of *Shaftsbury*, and that they are exempt, 1st, either by prescription; or 2dly, because there was a unity of possession in this abbey of lands and rectory for time immemorial; but the last defence, I understand, is substantially given up.

"Therefore the only question is, whether title by prescription is proved enough for a decree or an issue?

"The fact of *non decimando* is properly laid, as the foundation of this defence, and the proof is very clear on this fact. The law is, however, that the fact *per se* is no defence for laymen, unless they can cloathe themselves with the character of representatives and derivatives of the abbey, in which case they may prescribe *de non decimando*."

Confirmed by L. C. B. Mac Donald in 1799, deciding that a tenant for life might as well as a tenant in fee

In a very recent case of *Hett* v. *Meeds*, 1799 †, a new objection was started against the claim of this discharge from tithes, not from any doubt of the lands being parcel of the lands of an old *Cistertian* abbey, but because the person claiming the exemption was not tenant in fee simple, but only tenant for life under a settlement. The solution of this difficulty was, however, a full recog-

and therefore discharged, being dissolved by the statute of 31 Hen. 8. as one of the greater abbies. But note, lands, though of the Cistertian order, were not discharged, but *quamdiu in propriis manibus*; and even not all those, but only such, as were in them before the council of Lateran, as is expressed in that council, which was holden in 5 H. 2. anno 1179. The method of proving, whether the lands were purchased before or since the council of Lateran, is only by payment of tithes, which will induce a presumption that they were purchased after. And, *per curiam*, the defendant was decreed to account, for that it appeared, that the lands were in tenants' hands, and consequently, not discharged when they came to H. 8.

* 4 Gwil. MS. 1354. † 4 Gwil. 1516.

prescribe in *non decimando* as to abbey lands.

nition of the foregoing doctrine. Lord Chief Baron *Mac Donald* said, "It is admitted in this case, that a tenant in tail is entitled to the exemption, which is claimed, but it is argued, that a tenant for life, under a settlement, is not. It was said, that the tenant must hold the lands, as the monastery held them, else the privilege cannot attach. But it is impossible, that the lands can now be holden precisely in the same manner, as they were holden by the monastery: the monastery had them to them and their successors, but a man now has them to him and his heirs. But a fee simple may be divided into portions, into different estates, for life, in tail, and remainder in fee. Where will be the difficulty to say, that the tenants of each portion shall have the benefit as they succeed? The case of *Wilson* v. *Redman* has been cited; but from an extract from the answer in that case, which I have been furnished with, the parties there appear to have had a fee simple; and therefore that not being a case, in which it was necessary to decide the point, it cannot be considered of any authority. I confess, I cannot see any reason, why a tenant for life should be excluded from the benefit, any more than a tenant in tail, who, it is agreed is exempt: there seems to be no reason, why all the component parts of the estate should not be exempt, as they severally come into possession."

The court decreed unanimously, that the tenant for life was exempt, and dismissed the bill as against him, but without costs.

Long thought that the Knights of St. John of Jerusalem were not exempt from tithes.

It may not be improper here to notice, that a difference of opinion existed, for a considerable time, in the courts of *Westminster Hall*, as to the privileged orders, and more particularly the Knights of St. *John* of *Jerusalem*, which was a religious *lay* order, and not *clerical*. It was for a long time holden by the common law courts at *Westminster*, that the only religious houses, which were exempt from payment of tithes, were those, which came to the crown by the stat. 31 H. VIII. c. 13. by reason of the express clause of discharge in that statute: and therefore the lands of the Knights of St. *John* of *Jerusalem* which came to the crown by 32 H. VIII. c. 24. were not exempt from the payment, for want of an express clause therein to that purpose. But notwithstanding there had been divers resolutions to that effect, yet those opinions of the courts were never fully acquiesced in: and this point was often afterwards brought in question, till in the time of the Lord Chief Justice *Hale*, in the case of *Fossett* v. *Franklyn*, the matter was finally determined by the unanimous opinion of the whole court of B. R. that the lands of the Knights of St. *John* of *Jerusalem* were

Determined by Lord C. J. Hale that their lands are not tithe-able.

discharged from tithes. Then all the cases were fully considered. Sir *Thomas Raymond* gives this short report of that case *: "The "lands were parcel of the possessions of the prior of St. *John* of "*Jerusalem*, and came to the crown, by 32 Hen. VIII. c. 24. "and were parcel of St. *John*'s wood in the parishes of *Marybone* "and *Hampstead*; and whether they are discharged from payment "of tithes by 32 H. VIII. c. 24. was the question upon a trial "at bar, and a special verdict found thereupon. But it seemed to "*Hale*, Chief Justice, that they shall not pay tithes, by reason of "the word (privileges.) And in *Whitty* v. *Weston*, *Bridgeman*, "32. *Latch*, 89. *Godbolt*, 392. pl. 478. The court were divided. "But 2 *Cro.* 57. *Moore*, 913. pl. 1291. *Cornwallis* v. *Spurling*, in "debt upon 2 Ed. VI. Judgment was given, that the lands are "titheable, and so in a prohibition, 2 *Brownlow*, 8. 20. *Urrey* v. "*Bowen*, *adjornatur*. But *Dyer*, 277. b. pl. 60. is, that they are "not titheable. And judgement was afterwards given for the de-"fendant; and resolved the lands are *not* titheable."

A recent case, *Nash* v. *Thorn*, A. D. 1789†, has overruled all those cases, (there are several,) which suggest or support the doctrine sometime current, and favoured by men of prime respectability, that where no tithes have ever been known to be paid, prescription shall be presumed. To a bill of the rector for tithes of hay and wool, the defence was, that the defendant had paid no tithe, nor had any been yielded to any rector; therefore the defendant believed the estate exempt and discharged immemorially, though he could not set forth by what means. The court decreed an account with costs; because the defence was laid in a prescription in *non decimando*.

Prescription not to be presumed upon non-payment.

Ere I close this head of enquiry, it will be proper to notice, that by a modern and well considered determination of the Exchequer, in 1762, *Townley* v. *Tomlison*‡, the long prevailing doctrine, that the lands of the four privileged orders carried with them the statute exemption or discharge from the payment of tithes was overset; and the lands formerly belonging to the *Præmonstratenses*, (or *Norbertins*,) were thereby declared not to entitle the owners to that privilege. As this decision was against the received notions of *Westminster Hall* for so long a time, and consequently against the language of most of our books, it is presumed, that the judgment of Lord Chief Baron *Parker*, will be both acceptable and instructive

The prevailing doctrine of the lands of the four privileged orders being exempt from tithe overset by the Exchequer in 1762.

* Sir T. Raymond, 225, A. D. 1673, *Fossett* v. *Franklyn*. † 4 Gwil. 1324.
‡ 3 Gwil. MS. 1004.

to the reader. To a bill by impropriator for great tithes the defendant pleaded, that the lands were parcel of the abbey of *Cockersand*, which was one of the great monasteries, which came to the crown by the 31st Hen. VIII. that it had been a monastery beyond memory, and was discharged from payment of tithes, &c. *Parker*, C. B. in delivering his judgment, said, "That he should not speak to the absolute discharge, because given up at the bar; or, if not, most clearly destroyed by the decree in 24 Eliz. in the cause of *Kitchin* v. *Holme*, which had been read in evidence. That the principal question was, whether the lands in *Pilling* are discharged from the payment of tithes, as being parcel of the possessions of the abbey of *Cockersand*, of the *Præmonstratensian* order, whilst in the occupation of the owners of the inheritance by virtue of the statute of 31 H. VIII? *Innocent* the Third, he said, published a bull or decretal, dated 6 *Kal. Aug. Indictione primâ, anno* 1198, *anno pontificatûs sui primo*, wherein he confirms the order of *Premonstratenses*, settles and establishes rules for their conduct, garments, and other necessaries; and then follow these clauses: "*Porro nulla persona ecclesiastica pro chrismate, aut consecrationibus et ordinationibus, aut pro sepulturâ, pretium, aut pro benedicendo abbate, et deducendo in sedem suam, palefridum aut aliquod aliud a vobis exigere, nullus vestrûm, etiamsi exigatur, dare, præsumat: quia et exigentem et dantem nota et periculum simoniacæ pravitatis involvit. Sane laborum vestrorum quos propriis manibus aut sumptibus colitis, sive de nutrimentis vestrorum animalium, nullus a vobis decimas exigere vel extorquere præsumat, licet fundorum dominis pro rei proprietate aliquem censum vel quotamlibet partem reddatis.*" *Epistolæ decretales Innocentii Tertii*, published by *Baluzius*, *tom.* 1. *epist.* 331. p. 186. 188. of the edition at *Paris*, in 1682. According to *Bankes*'s argument in the case of *Dickenson* v. *Greenhill*, in Sir *Henry Calthrop*'s MS. reports, this privilege appears by the leger-book of the abbey to have been allowed in 12 E. III. and a definitive sentence given accordingly. Mr. *Selden*, in his History of Tithes, c. xiii. p. 406. is express, that they are exempted by this bull for lands of their own culture. And *Watson's Clergyman's Law*, c. 48. follows Mr. *Selden*, only mistakes Pope *Clement* for Pope *Innocent* III. But, notwithstanding all this, nothing can be clearer, than that this bull will not exempt this order from payment of tithes, for lands in their own occupation, unless it was allowed and received in *England*. Lord *Hale's History of the Common Law*, 29. *Keilw.* 181. 184. *Poph.* 157. *Old Bendl.* 164. and no allowance is shewn in any court. So far from it, that accord-

ing to Mr. *Noy*'s argument in 2 *Ro. Rep.* 479, when an abbot of this order came to do homage, the marshal took his palfrey from him, contrary to the express letter of the bull. It is true, that the *Cistertians*, *Templars*, and *Hospitallers* are discharged of tithes of lands in their own occupation, by the general council of the realm, *Dy.* 277. *Dobitoft* v. *Courteen*, *Cro. Jac.* 454. *Hard.* 101. *Gibs. Cod.* 701. *Stillingfleet's Ecclesiastical Cases*, vol. i. p. 305. but the books are silent as to the allowance of this privilege, to the order of the *Præmonstratenses*.

"In the present case, it appears by the minister's accounts from *Michaelmas* 30 to *Michaelmas* 31 H. VIII. and the record out of the Augmentation-office, that those lands were purchased by *Kitchin*, as subject to tithes. In the case of *Bradshaw* and *Clifton*, 26th June 1678, (the decree in which had been read in evidence,) it was decreed by the court, that the order of *Præmonstratenses* is not discharged of tithes as an order. In that case there was a rehearing, 17 Nov. 1679; and upon the rehearing the principal counsel in *Westminster Hall* were concerned; yet in regard the defendants failed in making out their exemption for the lands, *dum propriis manibus excolebantur*, it was disallowed, and they were decreed to account for the tithes demanded by the bill. The case of *Lambert* v. *Cummin*, 21st Nov. 1723, in this court, seems to be abandoned by the defendants themselves; for there an absolute exemption was insisted upon, and the bill dismissed; but here the absolute exemption is given up at the bar, as has been already observed.

"The bill was therefore dismissed."

Whether a whole country or district can prescribe in a *non decimando*.

Although it seem never to have been denied, that a layman could not prescribe in a *non decimando*, yet it was long doubtful, whether or no a whole country could not prescribe in a *non decimando*. The first case upon this question was in 1614, *Russell* v. *Backhurst* *, which was in a prohibition to stay proceedings in the spiritual court upon a libel there by the parson for tithe of underwood in the wealds of *Kent*: the prescription was set up: but *Coke* Chief Justice, and *Dodderidge*, seemed to incline to think, that a prohibition ought not to be granted, unless some ancient instrument in writing, or matter of record, could be produced, which should shew the foundation of the prescription *in non decimando*: for it seemed to them, that the prescription by a country *in*

* 2 Bulst. 285. The same case is given from Calthrop's MSS. by Sir *Henry Gwillim*, 270. under the names of *Russell* v. *Partridge*.

non decimando was in respect of some composition. And *Coke* said, that both the *Doctor* and *Student* and *Linwood* agreed, that a whole country may prescribe in a *non decimando*, where there is a sufficient maintenance for the parson over and above the tithes. But this does not appear to be a whole country, nor do its contents appear to us, so that it may be greater or less, for aught that we know; but there is only a suggestion made, to which we are not bounden to give credit. *The whole court*, however, says *Bulstrode*, *was clear of opinion that no prohibition should be granted here, but that tithes should be paid.* Soon after, viz. A. D. 1619, came the famous case of the Earl of *Clanrickarde* v. Lady *Denton* *. The defendant was impropriatrix of the rectory of *Tunbridge*, within the weald of *Kent*: and the plaintiff, in right of his lady, was seised of certain coppices within the parish, against the tithing of which he set up the like prescription. Sir *Jeoffrey Palmer* says, the defendant traversed the custom, and the issue was tried at bar in B. R. and found for the plaintiff and allowed †. But *Dodderidge* ‡, Justice, said, "If this land was discharged of tithes in the hand of the prior, and the priory was vested in the king by the stat. of 31 H. VIII. so that such discharge as was in the priory ought by the law to remain, though tithes have been paid ever since the making of the statute, and they therefore pray sentence for the parson, yet a prohibition shall be granted after sentence; for by law this land was discharged of tithes; and this constant payment ever since the statute, (admitting it to be so) does not make it chargeable by the laws of the realm; and, therefore, if their sentence be contrary to the law of the realm, a prohibition ought to be granted."

Though a general or an entire country may, yet particular districts may not prescribe in *non decimando*.

In *Johnson* v. *Bois*, the very next year, 1620 §, a prohibition being founded on a surmise, that a great liberty within the county of *Surrey* had been discharged from the payment of tithes, time whereof, &c. a consultation was awarded: for a prescription *in non decimando* is against common right; and though the weald of *Sussex*, or an entire country may prescribe *in non decimando*, yet such prescription cannot be allowed to a particular liberty, of what extent soever it may be."

The latest case, which I find before the court upon this question,

* 2 Rol. Rep. 122. Palm. 37. and much more fully from *Turner's* MSS. 1 Gwil. 360.

† Sir *Henry Gwillim* in a note, (whether of his own, or of the reporter's, or upon what authority does not appear,) says that a like custom had been found in the weald of *Surrey*, upon two trials in G. B. and B. R.

‡ Turner's Rep. 363. § 1 Gwil. 373. from Calthrop's MSS.

was in 1796, *Nagle* v. *Edwards* *, which was a suit by a lay impropriator for tithes of hay and agistment; and one of the grounds of defence was, that a modus *in non decimando* for hay and agistment covering this and many adjoining parishes, (being a very large tract of country,) of which the tithes were formerly vested in the abbey of L. the counsel for the defendant argued, that a custom *in non decimando* for a large tract of country is good †. Those authorities go to all sorts of tithes, to those due of common right as well as others. The distinction is, that a tract of country may prescribe; an individual, or even a parish, cannot ‡. Those for the plaintiff insisted, that a modus *in non decimando*, could only be claimed in a large and known division of the country, as the weald of *Kent* or of *Sussex*; or for a hundred or county, but not for a parish, or for a few contiguous parishes; and the case cited, *Hicks* v. *Woodson*, supports this distinction. By that case, as reported in 2 *Salk.* 655. 1 Lord *Raym.* 137. it is decided that even a county or hundred cannot prescribe *in non decimando* for things, which are *de jure* titheable, and Doctor Burn draws that conclusion from all the cases ‡. Lord Chief Baron *Macdonald*, in delivering the opinion of the court, said, "It seems clearly established by the case cited from 1 L. *Raym.* 137, and in *Salkeld*, that a modus *in non decimando* can only be claimed by some well known division of the country. The present claim is extended to certain parishes, enumerated in the answer, and which have not any common denomination, nor any mark, by which they can be considered as a distinct and separate district. The claim of a modus being therefore bad, in respect of the territory to be covered by it, it becomes unnecessary to consider the other question, as to what species of tithes such a modus may apply;" and therefore the court decreed an account.

The reference, which Lord Chief Baron *Macdonald* made to the case reported by Lord *Raymond* and *Salkeld*, is that of *Hicks* v. *Woodson*, 1696 §, and it is a very important one. Inasmuch as the Chief Baron specifically referred to Lord *Raymond*'s report of it, it is to be presumed, that it had the most emphatical bearing upon his Lordship's mind, in delivering the opinion of the court; it is therefore submitted to the reader.

* 3 Anst 702. † Doctor and Stud. c. 55. p. 147. 2 Inst. 645. *Hicks* v. *Woodson*, 4 Mod. 336. Carth. 390. 2 Salk. 655. Skin. 560. ‡ 1 Burnardiston, K. B 71. ‡ 3 Burn. 393. § It is reported in the following books, 2 Salk. 655. Carth. 392. Comb. 403. Holt, 671. Skin. 560. Lord Raym. 137. 12 Mod. 111. but most largely in 4 Mod. 336.

Lord Raymond's report of Wood v. Hickson's case.

" In attachment upon prohibition the plaintiff declared, that " there is, and time out of mind, &c. hath been, a custom within " the hundred of *Huntspittle*, in the parish of *Huntsbritch*, in *So-* " *merseitshire*, that every occupier of land within the hundred " should be discharged of tithes of agistment of barren cattle not " employed in the plough, nor for the pail; that the plaintiff was " an inhabitant for 5 years past, and yet is, within the hundred, " and occupies land there, and was and yet is possessed of divers " barren cattle, for the tithes of which, (notwithstanding the said " custom) the defendant libelled against the plaintiff in the spiri- " tual court, &c. and he declares also upon 2 moduses for tithes " of lambs, &c. and that the defendant sued for tithes of them, " &c. The defendant traversed the moduses and the custom, and " verdict for all was given for the plaintiff. And upon motion, in " arrest of judgment, by Serjeant *Gould*, that this custom was " void, the question was, whether a hundred may prescribe gene- " rally, in a *non decimando*, as in this case, to be free from tithes " for herbage and agistment of cattle. And after several argu- " ments at the bar, it was resolved, 1st, that in things titheable by " custom only, and not *de jure*, a county or hundred might pre- " scribe *in non decimando* generally; for, in that case the county, " &c. is discharged, without a custom to the contrary, so that it is " but to insist upon the old right, against which the custom has " not prevailed *. But for things which are titheable, *de jure*, a " county or hundred could not prescribe, *in non decimando*, no " more than a particular person; for it would be absurd to say, " that a hundred shall prescribe *in non decimando*, where the parti- " cular persons, of which it consists, could not. 2d, They re- " solved that wood is not *de jure* titheable, because it does not re- " new annually, Selden 237. 13 Co. 13. where it is said, that in " libels in the spiritual court for tithes of wood, they alledge a cus- " tom. (But note, the practice of the spiritual court was affirm- " ed at this day to be otherwise; but the court did not regard that, " for *Holt*, Chief Justice said, that they made stones, gravel, and " all things, titheable.) And therefore the case in March 25, 1 " Rol. Abr. 643, 644, may be good law, for the case there is of " wood. But this principal case is of agistment of cattle, which " is *de jure* titheable, as being recompensed by the grass, hay, &c. " which, otherwise, would yield tithes; and therefore the custom

* See 13 Co. 12. 3 Roll. Abr. 653, 654. 1 Rol. Rep. 22. 2 Buls. 185. March 25.

"is void. And the court did not only arrest the judgment, but "caused this entry to be made, *quia apparet curiæ domini regis,* "*&c. quod costuma prædicta, &c. nullius est vigoris, ideo consul-* "*tatio, &c* *."

Moduses are the most ordinary grounds of tithe suits.

We are now come to the most delicate, interesting, and important head of the whole system of tithing, namely, *moduses*, for it is the general ground of most suits between the parishioners and clergy: and in the establishment or evasion of moduses are to be traced most of the attempts to deprive the clergy of their due, or of parsons impropriate, or others to acquire more than the law has actually given them. It is evident from the nature of the system of tithing, that an almost indefinite variety of customs or modes of tithing must prevail in different parishes. All such particular customs founded in prescription become a part of the common law of the land, and as such have been cautiously attended to and supported by the different statutes upon the subject, as has been before observed.

Multiplicity of moduses.

There can be little question, but at this day, many more moduses are paid to parsons, than ever formerly existed: when the whole system of tithing is passed in review, the first material observation, which strikes the mind, is the paucity of tithes paid or received according to the common law of tithing. On one hand, the church receives in some instances tithe of things, which are not *jure communi* titheable, because they are not yearly renovant, as from wood, minerals, fossils, fish, &c. On the other hand, there is scarcely a parish to be found, in which some prescriptive exemption or peculiar mode of tithing does not at this day exist. To meet the facility, with which personal agreements and compositions between incumbents and parishioners, may in the run of very few years be mistaken for moduses, with which decrees and judgments may be collusively obtained from the interested or corrupt conduct of individuals, or with which old documents and evidences may be suppressed, destroyed, or lost, the law enables the incumbent on all occasions to insist upon his common law right of demanding tithes from his parishioners, and to throw the burthen of proving the exemption or modus on the parishioners: it also disables the incumbent from committing or concluding the rights of his successors. With infinite tenderness, delicacy, and

* For the defendant these books were cited, in this case. *Bro. dimes*, 13. *Doct. and Stud. lib.* 2. c. 55. *Plowd.* 645. 1 *Rol. Abr.* 653, *pl.* 8. *Heb.* 297. 2 *Co.* 44. 8 *Hen.* 7. 1 *b.* 1 *Sid.* 447. For the plaintiff 1 *Sid.* 321. 13 *Co.* 12. *Dier.* 363. 2 *Bulst.* 285. *March* 25. 2 *Saund.* 145.

precision have the courts, therefore, scrutinized these private claims, or prescriptive rights or moduses, which always are in contradiction to, and derogation of the common law. No otherwise, in fact, can the rights of the church be now invaded, curtailed, or defeated, than by fabricating moduses by some of the means before alluded to. We shall endeavour to elucidate the principle by a methodical adaptation of the cases.

Modus defined.

MODUS DECIMANDI (commonly called a *modus*) is where, by custom, a peculiar manner of tithing subsists from time immemorial, differing from the common law of taking tithe in kind; which would have taken place, in case such peculiar manner of tithing, or modus, had not been allowed of in the particular place and instance. This commutation, or substitution for the common law rule of tithing, may consist of a pecuniary compensation for the tithes in kind; or of a recompence in work or labour, or of a smaller quantity of titheable matter in greater maturity or perfection, than when it is strictly titheable in a cruder state; or of tithe of some matter abounding in a particular district, not strictly titheable, in lieu of things that are titheable *de communi jure*, which were scarce, or to be had with difficulty in the same place. In a word every special manner of tithing, differing in any manner from the common law right of demanding tithes in kind, is a *modus*. And in order to bring this anomalous system of tithing to some consistency, the following rules have been established as the criteria of an available modus.

Rules for moduses.

* 1st, Every modus must be certain and invariable.

2nd, The thing given or done in lieu of tithes must be (or rather have been) beneficial to the parson, and not only to third persons.

3rd, It must be something different from the thing compounded for, and not a part of it.

4th, A modus for one species of tithes shall not be a discharge from the payment of any other species of tithe.

5th, The modus must be in its nature, as durable as the tithes discharged by it.

6th, The modus must not be rank: that is, it must not much exceed what the value of the thing discharged was before the time of memory.

The manner of laying, pleading, and enforcing, or resisting payment of moduses, will fall within the scope of the last book.

* Vid. 2 Bl. com. 30.

After endeavouring to illustrate and establish these six rules by authorities, for facilitating and methodizing the doctrine of moduses, the determination of the courts shall be alphabetically arranged, in order that the moduses or discharges may follow the order, which we have observed of the things discharged.

1st rule certainty and invariability.

As to the first rule, that the modus must be certain and invariable, it is obvious, that an uncertain or fluctuating modus could not have been settled from time immemorial: for proof of prescriptive sameness is the very basis of such modus. Therefore in *Bean* (or *Bohn*) v. *Lea*, A. D. 1713*, a modus of 1*s.* in the pound upon the rack rent or value of farms underletten in lieu of small tithes, was holden void from the uncertainty: for how is it possible, that the parson shall know the value without annual and constant suits? In 1715, the same point was adjudged in *Shapter* v. *Mitchell*†, in 1724, in *Harrison* v. *Sharp*‡. In *Byne* v. *Dodderidge*, 1701 §, Lord Chief Justice *Holt* said, "a custom cannot be applied to "rents reserved from time to time upon frequent new reservations," and in *Startup* v. *Dodderidge*, 1705 ‖, the court held the like language. "This was a void modus, being an uncertain recompence "for a certain duty." In like manner are all distributive moduses void, from uncertainty, as was adjudged in 1721, in the case of *Turton* v. *Clayton* ¶, which was a pretended modus of 3*d.* for house, hay, hens, and yard, viz. 1*d.* for hay, 1*d.* for house ½ for hens, ½ for yard. Indeed every species of uncertainty that affects the modus is equally fatal. Thus in *Carleton* v. *Brightwell*, 1729**, (we quoted it before for another purpose) before Sir *Joseph Jekyll*. In a bill for tithes in kind, the defendant insisted on several moduses, one of which was, that the inhabitants of such a tenement, with the lands usually enjoyed therewith, had been accustomed to pay such a modus for tithe corn ††.

Instances of moduses being void from uncertainty.

* 1 Wood 537. 2 Rayn. from Dodd's MS. who quotes 11 Rep. 16. Hob. 11. 3 Mod. 73. Cro. Car. or El. 671, 671. 2 Leon. 117. 2 Keb. 280, 318. Latch 210. Sid. 49. 3 Mod. 132. God. 425. Hob. 60. Leon. 127.

† 2 Wood 13. ‡ 2 Wood 224. § 1 Lord Raymond 696.

‖ 2 Gwil. 592. Vid. also like case between the same parties; 1 Wood 283, in Exchequer, 1696.

¶ Bunb. 80. 2 Wood 180. ** Cox' Pr. Williams, 11, 462.

†† By the register's book, no such modus for tithe corn appears to have been in question in the cause; but the defendants by their answer insisted that "*all occupiers of farm houses* below, or on the north side of a lane called *Burfield-lane*, with the lands *usually* occupied therewith, have time out of mind paid 3*d.* at *Michaelmas*, in each year, for each cow, and *all* occupiers of farm houses above the same lane, or on the south side thereof, with the lands *usually* occupied therewith, have time out of mind paid 2*d.* yearly for each cow," in lieu of tithe of milk in kind. His honour declared this modus to be uncertain, and directed an account. Reg. lib. A. 1727, fol. 417.

"*Cur*'. This is quite uncertain, the house may fall down, or be "uninhabited, and then no modus will be payable; also nothing "can be more uncertain, than lands usually enjoyed with the te- "nement, since the lands let with a farm house, may probably be "often shifted."

Travis v. *Oxton*, notable case.

The Court of Exchequer, in 1779 determined that 1*d.* in lieu of tithe-hay of the lands occupied with each house in the parish was void from uncertainty: this was in the case of *Travis* v. *Oxton, Whitehead and others*, which is one of the late tithe causes, which raised some degree of ferment out of court: it was heard 10 successive days in the Court of Exchequer, who refused to send it to a Jury, and upon appeal to the lords the decree of the Exchequer was reversed. Their lordships, (chiefly by the argument of Lord Mansfield) thought proper to direct an issue to try the nature of the payment of this 1*d.* modus. *Anstruther* has, in a note, given the following succinct account of this case *.

* See 7 Br. Par. Ca. 49, and a very full report of this case in 3 Gwil. 1066 to 1096; he has favoured us with Lord *Mansfield's* argument from a note of Lord *Redesdale's*: in which is the following instructive and interesting passage: it shews the ground of their lordships decision; and how apt the public has been to continue in error. "From that "decree there is this appeal to your lordships; and the single point on the appeal is, "that there should be an issue to try the *legal* right; that the issue should be directed to "try, whether the vicar was endowed of the tithe of hay. This the appellants argue "on two grounds: 1st. that the conclusion does not follow, supposing the fact to be true, "which the vicar contends for, that a penny was paid for every house as for hay. 2dly. "by the rule of the common law, a vicar claims by his endowment; he receives here a "pecuniary payment, of which he was endowed in lieu of tithe, and such endowment "was of the money. Upon that part of the argument, if the case rested there, as to "the endowment being of money in lieu of tithe, I do not at present see any ground to "differ from the Court of Exchequer. It is well known, that in more ancient times, "whenever there was an appropriation of lands to a religious house, there was a perpe- "tual vicarage, and that vicarage was to be endowed. There were three ways, in which "a religious house, that had the land appropriated to them, (and it often happened, "that they had the property of the greatest part of the lands) there were three subjects, "with which the vicarage might be endowed. It might have lands by way of agreement: "it might have a pension by way of charge issuing out of the religious house; if they "gave a pension, they did not give the tithes; and if they gave the tithes they did not "give a pension. Another way of endowing was with a parcel of the parsonage, with "all the small tithes, or tithe of hay, perhaps tithe of corn, particular parts of the "great tithes. But when a pension is given, (and there great confusion, in my apprehen- "sion, has arisen in the argument,) they say, that money was given instead of the tithe; "it is incorrect, for it is money given, and no tithes. It is impossible to give money as "a satisfaction for tithes; money is given, and *no tithes*. The vicar, they say, had such "an annual sum of money instead of tithes; no; the impropriator gave him no tithes "there, but money only. Where there is a pension, if this is a pension, it is no argu- "ment of the right to tithes in kind. A religious house could not endow a vicar with "tithes in kind, and then make an agreement with him, that those tithes should be paid "in a manner contrary to law. They shall not give him tithes, and then say, he shall

The vicar the plaintiff claimed to be endowed with tithe of hay; the occupiers set up, and clearly proved in evidence, a *modus* of 1*d.* called the tilt penny, for the lands occupied with every farm house in the parish, in lieu of tithe of hay of these lands. The number of these *tilt-pennies* payable to the vicar, had necessarily varied from time to time, as the lands were divided among a greater or smaller number of occupiers. The court held this *modus* clearly bad on account of the uncertainty, and relied on *Turton* v. *Clayton Bunb.* 80. They then proceeded to decree payment of tithe of hay in kind; for a modus bad in law, is a valid composition, so long as it is allowed to subsist, and is a satisfaction for the tithes during that time; but the receipt of any payment in lieu of any species of tithes, is as much a perception of that tithe as payment in kind; and perception of tithes by the vicar, is evidence of an endowment, and therefore supports the allegation in the bill.

"The judgment was delivered by Mr. Baron *Eyre*, for the Lord Chief Baron *Smyth*, who was unable to attend the court."

The defendants appealed to the House of Lords against this decree, and seem to have rested principally upon its not having been clearly made out, that this *tilt-penny* was in lieu of hay-tithe. And upon this ground, and the non-payment of tithe of hay in kind to the vicar, Lord Mansfield thought that the claim of the vicar should not be decreed in a court of Equity against the common law right of the rector, where no endowment appears, and any doubt is raised in the proof. Upon his lordship's motion, the House of Lords, on the 26th of January, 1779, reversed the decree, and directed an issue to try, *Whether the tilt-penny had been accepted and paid as a composition or modus, in lieu and satisfaction of tithe hay.*

In a very recent case, 1791, *Markham* v. *Laycock* *, some of the defendants set up a *modus* payable at *Midsummer*, of 3*d.* for each and every oxgang of land, containing 16 acres of arable, meadow, 3*d.* per oxgang of 16 acres of arable, meadow,

"take them in a way, the law says could not have a legal beginning. The evidence of "the payment of money in the lieu of tithes, is then an evidence of the endowment of "the tithes. What Mr. Mansfield says has weight on that question, that where a "modus is set up in an answer to a bill brought by a vicar, and that *modus* is condemned "on the face of it, the vicar has a right to the tithes in kind, because it is evidence of "the endowment of the tithes. Who is to have them? They cannot go to the rector, "he has given up all right to them. Who is to have them but the vicar? Therefore I "am not inclined to differ from the Court of Exchequer on that point, because it would "be attended with bad consequences, in all bad *moduses* that not so pleaded."

* 4 Wood 375.

and pasture, void from uncertainty.

and pasture, after the rate of seven yards to the pole or perch, by them occupied within the parish, in lieu of the tithes of grass made into hay yearly, arising within the said oxgang of land; and the defendants state the quantities of arable, meadow, and pasture land occupied by them respectively in the years, for which an account of tithe hay was demanded by the bill. Against the legality of this modus Lord C. B. *Eyre* pronounced a very elaborate judgment, which is to be seen from his own MS. notes in Sir *Henry Gwillim**, in which he said, "If this modus had been sufficiently supported in fact by the evidence, even if it were now established by the verdict of a jury, still we could make no decree upon it; for we are of opinion, that this modus, as it is laid, is bad in point of law. I have already said, that it is necessary to the validity of a modus, that it should be a certain recompence for a certain duty. There is a class of cases, upon this head of moduses void for uncertainty, in *Startup* v. *Dodderidge*, 2 Lord *Raymond*, 1158. They were referred to, and considered by us, in the case of *Travis* v. *Oxton*, where a hay-penny was set aside on the ground of uncertainty. If the modus had been established in that case, not one of the ancient messuages would have paid, if they happened not to have mowing lands; and if they had, and all the mowing lands had belonged to one messuage, the only recompence would have been one penny, which was unreasonable, and therefore the *modus* was void.

"As the modus is stated in this cause, the oxgang, in respect of which the payment of 3*d*. is to be made, is to consist of arable, meadow, and pasture, and without any specification of proportions; and there is nothing to pay for an oxgang of arable only, or an oxgang of arable and pasture. By the fluctuation of lands in this parish, it may happen, that the arable may be occupied separate from the meadow or pasture, as for instance, suppose the number of acres in this parish, would make 100 oxgangs, at 16 acres to an oxgang, and each of those oxgangs consisted of arable, meadow and pasture; there would then be 100 three-pences to be paid to the vicar, in satisfaction of his tithe for the meadow. But suppose one half of those oxgangs to have no meadow, to be distributed amongst the other fifty; in that case the vicar could have but three-pence, which brings the case within the same principle as that of *Travis* v. *Oxton*. And this will not be the case, if we suppose, that it were proved, which it is not, that this modus

* 4 Gwil. 1339.

was payable for every oxgang of land, whether it had any meadow or not in it, so as to make the whole parish contribute a certain sum at all events to the vicar, which sum shall be neither more nor less; because in that case, (the case I first put) all the lands in the parish reduced to their own proper oxgang, contribute their proportions to one fixed and certain recompence for the tithe of the meadow land, which will be always payable to the vicar out of the specifick lands, independent of the uncertainty and fluctuation of the occupation.

"The conclusion is, that this modus, being neither proved, in fact, nor *good in law*, the plaintiff will be entitled to tithe hay, which he prays by his bill."

Several other moduses have been set aside for various grounds of uncertainty: as in *Barwell* v. *Coates*, 1723*, one shilling at Easter in lieu of tithe hay of a farm: in *Birch* v. *Stone* †, 1724, the parsons's meadow and beast grasses, in lieu of tithes within the parish: in *Tulley* v. *Kilny*, 1723‡, to carry a cartload of turf to the parsonage house, in lieu of tithe of hemp, flax and hay. In *Philips* v. *Symes and others, and vice versa* §, 1725, 3*s.* 4*d.* payable for every score of sheep at Easter, or otherwise, when the sheep shall be sold: and in *Fenwick* v. *Lambe*, 1758 ‖, a fodder of hay in lieu of tithe of hay of the whole township: in *Scott, D. D.* v. *Fenwick and others*, 1783¶, a yearly sum payable by the occupiers of ancient tenements for the tithe of hay from commons. In this last case Lord Chief Baron *Skynner*, who was noted for the peculiar attention he gave to all tithe causes, thus spoke, "The modus, as it is alledged, i. e. for *hay* and agistment cannot be supported. It is not proved, that by any usage or custom antecedent to the time, when the inclosures were made, any modus was paid in lieu of any tithes arising on the commons; and the usage since the enclosure has been, as to these allotted lands, in direct contradiction to such a *modus;* for tithe in kind has been paid for these lands both of hay and agistment. Nor does it appear, that any agreement was made with the rector, at the time of the enclosure, respecting the payment of any modus for tithes, or for saving the rights of the owners of the farms, over the lands, when they should be enclosed; and without some agreement it might be a question, which it is not now necessary to discuss, whether the

Further instances of moduses being void from uncertainty.

* Bunb. 129. † Dec. book 113 ap. 2 Gwil. 649. ‡ Bunb. 126.
§ Bunb. 171, and Decree book, 5 Feb. 1725. ‖ Amb. 365.
¶ 3 Gwil. 1252, from MS. of Lord Chief Baron *Skynner*, who gave judgment in that case.

modus was not extinguished by the enclosure? But, supposing that by usage antecedent to the enclosure, a modus of one penny had been paid for the farms and the commons, it could not have been paid for hay on the commons; for the commons, by the nature of them, and of the rights over them, could not have produced hay. Such a usage could not have afforded a presumption of any ancient agreement on the part of the rector to receive, and on the part of the owners of the farms to pay an annual sum, in lieu of the tithe of a tithable matter, which at the time of making it, could not have been in contemplation of either of the parties, as the subject of their agreement, and over which one of the parties had no right. For, supposing the ancient rights of the owners of the farms to have been continued after the enclosure; yet the right of the owners of the farms could not, before the enclosure, be extended to any exemption from payment of tithe of hay; because, if hay had been produced on any part of the common, it would not have belonged to the owners of the farms, who paid the modus, but to the owner of the land, on which it grew, who was the lord of the waste. Considered in any light, this modus, in the manner it is alledged, for hay, and agistment, cannot be supported."

2d rule. It must be beneficial to the parson.

As to the second rule, since every modus is but an immemorial composition, it must be of course presumed, that the parson would not have entered into it, for any consideration, that was not in fact, or intended to be beneficial to him and his successors. Therefore was it said by *Fortescue* in *Chapman* v. *Bishop of Lincoln and others, et vice versâ*, 1730 *: "The modus to repair the "church could not be good, because the parishioner was bound "to do it, without such a *modus*; and doing it was no benefit to "the parson; but if it had been to repair the chancel, it had been "a good modus; for that would have been an advantage to the "parson." In 1587 †, *Savell* v. *Wood*, 5*s.* paid to the parish clerk, was not allowed to be a good *modus* in discharge of tithes: and in 1591, in *Scong* v. *Baker* ‡, finding straw for the body of the church was not considered a good modus, in discharge of tithe of hay, the parson having no seat in the body of the church.

3d rule. Must not be a part of the

As to the third rule, a smaller quantity of one titheable matter is no good modus for a larger quantity of the same matter, as in

* Mos. 266. Eq. Ca. abr. 367. Fitzgib. 119. 2 P. Williams 565. Bernardist. B. R 293.

† Cro. El. 71. Moore 908. 1 Leon. 94. ‡ 1 Gwil. 163.

Mason v. *Holton*, 1722 *, a modus was insisted upon that the rector had always enjoyed a small meadow (producing about four loads of hay) in lieu of the tithe of a large one (producing about 150 loads;) but the court held it impossible to conceive, that men in their senses should accept of 4 instead of 15 loads, and therefore rejected the *modus*. In *Torriano* v. *Legge*, 1763 †, amongst many moduses over-ruled for different reasons, was one of 4*d*. for every orchard in lieu of the tithes of all fruit trees in the parish, because it was a modus of one tithe in lieu of another. Yet it has been said, that this rule applies only where the things are titheable *de jure*, but not by custom ‡. thing compounded for.

The fourth rule is, that a modus for one species of tithe is no discharge from the payment of another species of tithes. It is clear, that this would be discharging tithe by tithe, which cannot be. Thus a modus of 4*d*. for every milch cow, would discharge the tithe of milch kine, but not of barren cattle, or the tithe of herbage §. They are all titheable by common law; and therefore a modus for one cannot be a discharge for another. 4th rule. Payment of one species of tithe, no discharge for another.

The fifth rule of the codurability of modus and tithe, is fully within the doctrine before laid down, as to the certainty of the modus. There must not be an uncertain recompence for a certain duty. In *Hardcastle* v. *Smithson and Slater*, 1745 ‖, Lord Hardwicke said, "The second objection was, that the modus ought to be certain in the point of quantity, and in point of remedy; and in general, the rule of law is, that a modus ought to be equally certain as the tithes, in lieu of which it comes: and is so laid down in a case in the Court of King's Bench, of *Startup* v. *Dodderidge* ¶, *that a modus ought to be as certain as the duty, which is destroyed by it*. To say it must be equally certain, does not mean, that it is to be weighed by grains and scruples. In a case in *Hob*. 39, there was a modus for a park of 2*s*. a year, and a shoulder of every third deer killed in the park, which is now disparked. Consider how uncertain this was, for the owner might kill none: and yet Lord *Hobart* was of opinion, after it was disparked the modus remained of 2*s*. a year. I mention this to shew, that when books say, that the modus must be as certain, they mean it must be so taken to a common reasonable intent." So a modus that every inhabitant of a house shall pay 4*d*. per annum, in lieu of the owner's tithes is no good modus; for as Lord *King* observed in 5th rule. The modus and tithe must be of equal duration.

* 2 Burn. Ec. L. 393. † Bl. rep. 420. 2 Rayn. 519. 3 Gwil. 909.
‡ Deg. p. 2. c. 2. § Deg. p. 2. c. 16. Burns E. L. 392.
‖ 3 Atk. 245. ¶ Salk. 657.

the before mentioned case of *Carleton* v. *Brightwell, the house may fall down, or be uninhabited, and then no modus will be payable.*

6th rule. The modus must not be rank.

As to the 6th and last rule, it is obvious, that every bargain or composition, which is supposed to have pre-existed the time of memory, must necessarily bear a proportion to the value and price of the *quid* and the *pro quo*, of those days. Whatever modus then notoriously exceeds such proportion is deemed *rank:* numerous are the instances, in which the courts have rejected moduses upon this ground. Lord Thurlow said in *Bishop* v. *Chichester*, 1787 *, that the rankness of a modus depended upon the history of money, and certainly was in itself a question of fact and not of law: but although it were a question of fact, it was a question, which the court had frequently decided. If a modus were notoriously rank, there was no reason, why a court of equity should direct an issue to try a fact of which it was perfectly satisfied. " The following moduses have been holden rank by the courts, viz. 5*s.* per acre of wheat and rye; 4*s.* per acre of summer corn; and 3*s.* per acre of grass, *Benson* v. *Watkins*, 1716 †: 1*l.* 4*s. per annum* for a farm modus ‡; in *Loveday* v. *Moorer*, 1720, 12*d.* for a milch cow; *Franklyn and others* v. *Master and Brethren, of St. Cross and others* §, 1721, 3*d.* for every lamb yeaned in the parish; *Goddard* v. *Keble*, 1722 ‖, 1*s.* per acre for tithe hay; *Bate* v. *Hodges*, 1723 ¶, 48*l. per annum* for a manor of the annual value of 80*l.*; *Ekin* v. *Pigott*, 1745 **, 4*l.* 10*s.* payable yearly on a day certain for a farm worth 30*l. per annum*, 1731 ††, 5*s.* an acre every year, for all lands sowed with wheat; 2*s.* 6*d.* an acre for all lands sowed with oats or any other grain excepting wheat; 1*s.* 4*d.* an acre for all grass lands mowed, called *uplands* or *forest lands*; 2*s.* an acre for all grass lands mowed, called *meadow* or *pasture lands*, in lieu of all tithes of hay, grass, and pasture. In *Torriano* v. *Legge*, 1736 ‡‡, 2*s.* per acre in lieu of grain reaped on enclosed arable land; and 1*s.* 6*d.* per acre of such land in common field, *Gale* v. *Carpenter*, 1768 §§; 4*s.* per acre of wheat, and 2*s.* per acre of lent corn, *Hulse* v. *Munk*, 1769 ‖‖; a modus or customary payment in money of 4*s.* and no more, for every ten lambs depastured or fattened; 2*s.* and no more for every five such lambs; 4*d.* a piece for

Instances of rank moduses.

* 4 Gwil. 1350, from a MS. of Mr. *Cox*. † Bunb. 10.

‡ 2 Wood 152. Lord Chief Baron *Macdonald* inclined not to decree any farm modus as rank: *Atkyns* v. *Lord Willoughby de Broke*, 2 Ans. 402, 1794.

§ Bunb. 78. ‖ Bunb. 105. ¶ Bunb. 125. ** 3 Atk. 298.

†† 2 Wood 305, and Bunb. 301. ‡‡ 1 Bl. Rep. 420, and 2 Raym. 518.

§§ 3 Wood 173. ‖‖ 3 Wood 211.

all such, under five; and for all such above five, and under ten, *4d.* a piece, and no more, yearly, at the time when the rector's tithe-gatherer or farmer thereof collected the tithe wool, in lieu of the tithes of such lambs; and for all other lambs bred within the said parish, *3d.* and no more, yearly payable as aforesaid, for, and in lieu, and in satisfaction of the tithes of and for all such other lambs; *Wood* v. *Harrison*, 1769 *, *3d.* for every lamb, in lieu of the tithe of lambs and agistment, so notoriously rank, that the chancellor would not send it to a jury; and *2s. 6d.* per acre of corn and grain, *Bishop* v. *Chichester*.

An alphabetical list of such Moduses or Special Customs as have been allowed of by the Courts of Law.

ABBEY LANDS. For their exemptions, privileges, and discharges from payment of tithes, see what has been before said under the heads of the statute law and elsewhere. Abbey Lands.

Aftermowth. (After-grass, lattermowth, eddish, rewine.) In *Aubrey* v. *Johnson*, 43 Eliz. cited in *Andrews* v. *Lane* †, 1633, this difference was taken; that where the prescription is to make the first mowth (or math) into perfect hay, there it is a good *modus decimandi* for the second mowth ‡; for there is a reciprocal benefit to the parson. Otherwise is it, where it is to make the hay into grass cocks, for this is the parson's due of common right. In the same case, Lord Chief Justice *Richardson* mentioned this case, which arose in Cambridgeshire. One prescribed, that where the grass grew in a wet place, in consideration of his carrying it out of such watery ground to another dryer place to make it into hay, he was to be discharged of the tithes of the aftermowth, and held it to be a good *modus decimandi*. In *Durram* v. *Booty* §, 1701, a custom to discharge the lattermath of clover from tithe, in consideration of the parishioners making the first growth into grass of equal cocks at his own expence, and setting out the tenth cock, is a good *modus decimandi*. The same point determined in *Wood* v. *Harrison*, 1769 ||. Aftermowth.

Agistment. In *Green* v. *Hun* ¶, 1598, a prescription that for young cattle reared for the pail, to be milch kine, or for the plough, no tithes have been accustomed to be paid, adjudged good. For Agistment.

* 3 Wood 250. † 2 Gwil. 476, from Bridgeman's MS. and Moor, 910.
‡ *Green* v. *Austin*, 2 Cro. 116. § 2 Lutw. 1071. || 3 Wood 250.
¶ Cro. El. 702, and Moor 910.

they be for the public weal, and the parson is to have them in another kind. And it was holden, that for pastures of such cattle no tithes are due, *for the reasons aforesaid.* N. B. This having been *admitted* as a good prescription or special custom, is demonstration, that by *common law tithes are due* for the pasturing of such cattle, as before observed.

In the important and noted cause of *Bateman* v. *Aistroppe and others*, 1774*, a modus to pay 4*d.* per acre, in lieu of agistment tithe of barren cattle above a year old, if fed one month in the parish was allowed. In *Warren* v. *Fisher*, 1785 †, the court declared they could not direct an issue upon any modus, that was not laid with precision: and that a modus for agistment tithe *was fatally defective*, from not specifying the particular time, for which the modus was payable, *for the time to be covered is most essential in agistment tithe.*

Agistment moduses must specify the time to be covered.

It is suggested in Godolphin ‡, that there may be a custom, that strangers should pay the agistment tithe for their own cattle taken in to depasture in another parish. *Sed quære.* For the case of *Facey* v. *Long* §, therein referred to does not apply to any such custom.

Altarage.

Altarage means generally, not only small tithes, but all oblations whether in bread or money, &c. made to the altar ‖. And *by usage*, under the word *altaragium* tithe-wood, though *de jure* a great or rectorial tithe, may pass to the vicar, though the law be against it ¶.

2*d.* per hogshead of cyder for all apples, good.

Apples. A modus of 8*d.* was allowed for every hogshead of cyder made of apples, grown in the parish, *Roe* v. *Bishop of Exon*, 1719**, 2*d.* per hogshead of cyder for all apples made into cyder, a good *modus*, and so sent to a jury, *Bedford* v. *Sambell*, 1775 ††.

Asp trees exempt by custom.

Asp trees by custom in Buckinghamshire are not titheable, for there it serves for timber. Anon. 1619 ‡‡.

Good cus-

Beans (as of peas) in *Gumby* v. *Burt*, 1724 §§, a custom is re-

* 3 Wood 466. In quoting this case I have referred only to Wood, as giving the pleadings and decree, in which there can be no misrepresentation. Unaccountable are the weight and extent of prejudice, and bias for and against the report and observations of the reverend plaintiff in that cause, who in 1778 published a Treatise on Agistment Tithe, and an Appendix thereto in 1779. This Rev. gentleman is rather severely animadverted upon by Mr. Rayner, (p. 715,) for becoming his own solicitor against an act of Geo. II.

† 4 Gwil. 1270, from MS. ‡ Rep. Can. 384. § Cro. Car. 237, 559.
‖ God. 339, 340. ¶ *Reynolds* v. *Green*, 1612. 2 Bulst. 27.
** Bunb. 579. †† 3 Gwil. MS. 1058. ‡‡ 2 Rol. Rep. 83.
§§ Bunb. 169.

ferred to as being good, for the vicar to receive tithes of beans and peas, where the plough and spade are used: but where the plough only was used, there the impropriator received them.

Custom for vicar to receive tithe of beans (and peas) where spade used; where the plough, the rector had them.

Beech, as it has been before observed, (p. 121) is by custom considered as timber in Buckinghamshire*, and therefore not titheable there. And an issue was directed in 1724†, to try, whether in the neighbouring county of Bedford, it were by custom not titheable as timber; which issue presupposes the goodness of the custom.

Good custom for beech not paying tithe.

Calves. Sixpence for every cow depastured within a parish payable at Michaelmas, has been admitted a good modus in lieu of the tithes of milk and calves. *Boscawen* v. *Roberts*, 1768‡.

6*d.* per cow in lieu of calves and milk.

In *Phillips* v. *Symes*, 1724§, 8*d.* for every cow, and 4*d.* for every heifer, in lieu of the tithes of milk and calves of such cow and heifer, was admitted to be a good *modus*. It is not infrequent to observe, that in long lists of moduses set up (the observation is made under correction) some of them, which the incumbent has not thought requisite specially to contest, have been less advisedly allowed of by the courts. It does not follow, because a particular modus has been allowed (even inconsiderately) in one parish, that whenever a like modus is pleaded in another parish it is not open to every external and internal objection, which the rector or vicar may urge against the new claim. Each special custom or modus stands upon it's own bottom: one cannot be a precedent for another. In the case last mentioned, there appears an incongruity and repugnance in taking 4*d.* for a heifer, in lieu of *calf* and milk, which a heifer gives: now it is clear, that at all times in this country, a *heifer* has been known as a female beast of the ox kind, that never had a calf, and she remains a heifer until she has had a calf: after that she becomes a cow. Such was the opinion of the 12 judges in *Cooke's* case‖, who, in 1774, was indicted for stealing a cow, which, proving in fact to be a heifer, he was acquitted, as the evidence did not support the indictment. If then from the fall of the calf, and consequently from the flush of milk the beast become a cow, the milk of the same animal whilst she was a heifer, was a non-entity, and therefore no valid or possible consideration for a modus, as is self evident.

8*d.* per cow, and 4*d.* per heifer for milk and calves of such cows and heifers.

Heifers not milch.

In case there be fewer than 10 calves, it has been adjudged a good custom, (which evidently did spring from the canon law,)

Calf modus.

* Lapthorne's case, 1 Rol. Rep. 355. † *Bibey* v. *Huxley*, Bunb. 192.
‡ 3 Wood 174. § Bunb. 171. ‖ Leache's Crown Law 109.

that if there be 7, the parson shall have one calf; if under 7, then 1½*d.* or whatever custom shall direct for each calf*. Dr Burn† says, (he produces no authority,) that in most places at this day the custom has prevailed. (N. B. this is no ancient modus,) that if there be 5, the parson shall have the value of half a calf: if 6, he shall have one entire, and shall receive or pay out respectively a proportionable sum under 5 and above 6. According to Rolle‡, it is a good custom to pay one calf out of 7 calves in the year; if under 7, a farthing for each, and a tenth of the price, for which any calf shall be sold.

12*d.* for a fat beast, and 6*d.* for a lean beast, sufficiently certain.

Cattle. The 2 Edw. VI. c. 13. directs, that the tithes of cattle feeding upon wastes or commons, where the bounds of parishes are uncertain, shall be paid to the incumbent, where the owner inhabits, unless exempt by *custom or prescription:* which exception supposes the actual or possible existence of a good and available custom to the contrary. In *Bishop* v. *Chichester*, 1787 §, a modus to pay 12*d.* for a fat beast and 6*d.* for a lean beast, was holden legal and sufficiently certain, by Lord Chancellor Thurlow.

Cherry trees exempt by custom in Bucks.

Cherry trees ‖. The like custom as to their being timber in Bucks, as of beech and asp.

Cheese modus.

Cheese. In *Austin* v. *Lucas*, 1598 ¶, it was adjudged a good prescription to pay the tenth cheese between May and August, in lieu of the whole tithe of milk for the year. (Not the tenth quart of milk, because cheese is made with labour and cost.)

No specific modus can exist of new productions though they may be co-

Clover **. To this it was said a modus may extend (as well as to *hops*,) though of late brought into England, if the modus be to cover all small tithes ††. Upon few points has more error arisen, than upon that of moduses affecting productions of novel introduc-

* Gibs. 708. † 2 B. E. L. 424. ‡ 1 Rol. Ab. 648.

§ 4 Gwil. 1320, from Mr. Cox's MS. ‖ 2 Rol. Rep. 83. ¶ Moore 909.

** Under this principle also fall the tithes payable for potatoes, which, of all vegetables, are now grown and consumed in the greatest quantity throughout the United Kingdom. They are of modern introduction, having been brought by Sir Walter Raleigh from Virginia to Ireland, about the year 1610, and were next cultivated in Lancashire, whence their culture spread, but slowly, throughout other parts of this kingdom. No specific modus can consequently exist concerning potatoes. But they may be affected or covered by a modus in lieu of payment of small tithes generally; for they were, after much consideration, decreed by Lord Hardwicke, in 1742, (*Smith* v. *Wyatt*, 2 Atk. 364,) to be small tithes in whatever large quantities they might be set or sown. According to the case of *Bosworth* v. *Limbrick and others*, 1777, hereinbefore quoted for other purposes, the court of Exchequer determined, that the parson has a right to insist, that a tenth part should be separated from the nine parts, upon the spot where the potatoes are dug, and before they are removed.

†† This said in a note to *Bate* v. *Spraking*, Bunb. 20.

tion since the time of memory. Nothing can be more evident, than the impossibility of any composition (every modus is an immemorial composition) affecting, or being specially grounded upon a produce unknown in this country, at the time when a modus could only have taken a legal origin; therefore was it said in an anonymous case*, 1670, where a modus was set up of so much an acre of tithe hops, time out of mind; it was denied, for that *there could be no such composition time out of mind, hops not being known in England until Elizabeth's time.* But it was said by the court, that perhaps the vicarage was endowed time out of mind of the small tithes, of which nature hops were. So was it holden in *Durrant* v. *Booty*†, 1701, that there was no difference as to the aftermowth of *clover-grass* and ordinary grass. Wherever then the modus bears exclusively or specifically upon the new produce, as so much per acre of *hops*, (or clover,) there the modus cannot hold: but where the modus consists of a pecuniary payment for all great or small tithes in a particular district, there the new produce upon the land covered by the pecuniary modus, shall fall under it according to its nature. Every new introduction will, according to its nature, be either a great or a small tithe. Thus, for instance, clover or sainfoin, "when cut green and made into hay is of the nature "of all other grass, made into hay, and consequently must be-"long to the parson, or other person, who is entitled to tithe hay;" as it was specially said in *Wallis* v. *Pain*‡, A. D. 1738. So also was it holden in *Franklyn* v. *Bennett*, A. D. 1721 §, that the vicar being endowed of small tithes of hay, he was thereby entitled to hops, being a small tithe, though of growth since the endowment, and also to clover, sainfoin, and ryegrass, which are species of hay; that being the genus. The case would, I presume, alter, in case a modus were established in a parish of 2*d.* per acre of meadow land, or the hay produced therefrom. Now, although clover might fall under a general hay modus, yet could it not fall under a mensurate modus of a particular quality of land, (such as meadow land,) from which *clover*, or other artificial grasses are not produced. They are the produce of ploughed or tillage land. The diversity, therefore, appears to be, that modern introductions may be *generically*, not *specifically* affected by an ancient composition or modus.

vered by a general modus for great or small tithes according to their nature.

Coal, it is said, may be titheable by *custom* ‖. In *Tucker* v. *Gorges*, 1667 ¶, Saunders sued a prohibition in suit for tithes of

Custom to tithe coal good.

* 1 Vent. 61. † 2 Lutw. 1074. ‡ Com. Rep. 633. § Bunb. 79.
‖ Gibs. 678. ¶ 2 Keb. 177.

coal, alledging a special custom, which in his suggestion he denied, and *per curiam* it was granted.

Do. rabbits. *Conies*, (rabbits,) are titheable by custom only *.

Corn titheable according to the custom of the place. *Corn*, according to Godolphin †, and the other books, is titheable according to the custom of the place: this imports, that in the mode of tithing all sorts of grain, it would be difficult to find a bad custom.

Cyder. Vide apples.

Pigeons may pay by *custom*. *Doves* (pigeons) in a dove house, may pay tithe by custom ‡. In *Hayes* or *Hawes* case §, Lord Chief Justice Ley put the question, whether young pigeons should not pay tithe?

Tithe eggs. *Eggs.* In *Lee* v. *Collins* ‖, 1616, it was adjudged a good modus to pay 30 eggs in lent for all tithes of eggs. This appears to break in upon the general rule, that every modus should be something different from the thing due. But here the parishioner must pay whether he have hens, or they lay or not at this particular season, for (when the fast of lent was observed) being in more request they were then dearer than at other times. But Lord Chief Justice Holt said, with reference to this case in *Hill* v. *Vaux* ¶, "if the "custom was, that he should pay 30 eggs of his own hens, the "custom would be ill." In *Brinklow* v. *Edmonds*, A. D. 1731 **, a *modus* was established for paying 3 eggs for every cock, and drake, payable on Wednesday before Easter, and for every hen and duck respectively, 3 eggs in lieu of tithe eggs, and chickens, and ducks hatched in the parish.

Customary tithe for fish. *Fish* in a pond was resolved not to be titheable *sans custome*, in *Nicholas* v. *Elliott*, 1713 ††. The like resolution in *Austen* v. *Nicholas*, 1717 ‡‡, in Earl of *Scarborough* v. *Hunter*, 1719 §§, a custom to pay the impropriator 12*d.* in the pound, for all fish caught in he sea and brought into the port of Hartlepool, and sold within the parish there, and the twentieth part of all the fish caught by the parishioners and sold elsewhere was set up, and sent to issue, but not proved, therefore it was not established; but settled by agreement to pay the 12*d.* in the pound: but the court inclined to think the custom good, had it been proved. In *Gwavas* v. *Kelynack*, A. D. 1728, which was a very noted case, the decree

* *Webb* v. *Newman*, 1667, 2 Keb. 140. *Philips* v. *Clever*, 1679, 2 Keb. 453. *Marsh*, Anon. 56.

† Rep. Can. 393. ‡ Anon. 1 Vent. 5, 1667.

§ 2 Rol. Rep. 458, A. D. 1624. ‖ 1 Rol. Ab. 648. ¶ 1 Lord Rayn. 358. ** Bunb. 307. †† 4 Gwil. 1581, from Dodd's MS.

‡‡ 7 Br. P. C. 9. §§ 2 Wood, 116. Bunb. 43.

of the Exchequer was given by three barons (*reluctante*, Baron *Hale*,) and the decree was afterwards affirmed in the lords, the following custom was established as good: viz. that every parishioner being proprietor or occupier of any fishing boat, fishing net, or other fishing craft, which had been usually tied, &c. within any part of the rectory or parish, when not used in fishing, ought to pay to the impropriate rector, the tenth part of all great and small fish taken in the bay, or adjoining seas with such boats, (except fish used for bait, &c.)

N. B. It is to be noted, that in this case, a decree for payment for fish in kind, or a tenth penny, which was esteemed in effect to be a payment in kind, was decreed in 1680, in *Gwavas* v. *Teage**, and soon afterwards the defendants in that case, together with several fishermen, in all 160, signed a note or memorandum on the back of the writ of execution of the said decree, promising to pay tithes according to the words of the decree, to their plaintiff, his heirs, and assigns. After an acquiescence of about 40 years in this decree, when some of the fishermen refused payment, and in 1724, the impropriator filed his bill in the Exchequer for these customary tithes, the defendants put in three several answers, in one of which they denied the custom, and an issue notwithstanding the former decree, was directed to try it. A rehearing was had at the motion of the plaintiff, and again an issue to try the custom at bar in B. R. was directed: from which decree† the plaintiff appealed to the lords, who, in 1729‡, affirmed the decree of the Exchequer. All this was done notwithstanding the first decree in the Exchequer in 1680, and the acquiescence of all parties for 44 years under it. This is a point of primary consideration to all such incumbents, as feel themselves aggrieved under modern compositions and decrees; which, though perhaps originally fairly intended by all parties, yet from subsequent changes of circumstances, the original art or design of some of the parties, perhaps also from the inattention either of counsel or the bench to some leading principles not brought forward or insisted upon, either a bad modus may have been established, or common law rights may have been waived, surrendered, or lost. It seems in fact incompatible with that general tutelary principle, which the law casts around the clergy and their ecclesiastical property, that by any act of an incumbent, whether of corruption, weakness, or neglect, or by any act of another, (save of the legislature,

* 1 Wood, 203. † 2 Wood, 284. ‡ 2 Br. Par. C. 446.

in all, and of the judicature in many cases,) his successors shall be deprived of any of those rights and advantages, which did, or ought to have come to the incumbent upon his induction to the living.

In the year 1716, in *Woolridge* v. *Henna* *, the plaintiff as vicar of *Mevagissey*, in Cornwall, sued for, and had a decree for payment of tithe (by custom) of all pilchards and other fish caught at sea, and brought into that parish. But in 1766, in *Williams* v. *Baron* †, the plaintiff being rector of the neighbouring parish of St. Ewe, filed a bill against *Baron* the vicar of Mevagissey, and others, for payment of a tenth part of the wages (usually paid part in money, and part in fish,) of such of his own parishioners as worked with the master seynors of Mevagissey: and notwithstanding the decree of 1717, in *Williams* v. *Baron*, and although C. B. Parker declared, that Mr. Baron's (vicar of Mevagissey) claim of any benefit from the personal labour of the inhabitants of St. Ewe, could not, in his opinion, have a reasonable commencement, yet an issue was directed to try the custom. This case further illustrates, and confirms the observations made upon the preceding case of *Gwavas* v. *Kelleynack*.

Eggs may be paid as a modus for fowl.

Fowl, (chickens, &c.) A good *modus* may be in lieu of them by payment in eggs. (Vid. p. 123.)

Modus for fuel.

Fuel. It was said in an anonymous case, A. D. 1698, that whether tithe were to be paid for fuel spent in the house, *where there was no custom*, the court would not determine, because there were cases both ways. This implied the goodness *of the custom*, wherever it could be proved. In *Roe* v. *Bishop of Exeter* ‡, 1719, a hearth-penny was allowed to be a good *modus* for fire-wood spent on the farm. So was a smoak-penny allowed a good *modus* for all wood burnt in the house, 1731, *Brinklow* v. *Edmonds* §.

Modus for gardens and orchards good. N.B. No such word in the register as orchards.

Garden. A penny for ancient *gardens* and orchards adjudged a good *modus*, 1716, in *Perrott* v. *Marwick* ‖. But, N. B. this is said, conjunctively, not disjunctively: for *orchard* is included in the word *gardinum*; there being no such word in the register as *pomarium* or *orchard*. Vide before p. 133. In *Phillips* v. *Symes*, and *vice versa* ¶, 1724, a garden penny for the produce of the garden was allowed. And in 1726, the like modus was allowed for the fruits of the garden, (except apples and pears,) *Thompson* v. *Holt* **.

Hay modus.

Hay. In *Johnson* v. *Aubrey* ††, 1599, a custom that the occu-

* 2 Wood, 50. † 1 Freem. 334. ‡ Bunb. 57. § Bunb. 307.
‖ Bunb. 79. ¶ Bunb. 171. ** 2 Wood, 269.
†† Moore, 910, and Cro. Eliz. 663.

piers of meadow ground should make the first vesture into hay, and pay the tenth cock thereof in satisfaction of the tithe of such first vesture, and of the aftermath likewise, was established as good. In 1724, in *Finch* v. *Master and others**, a modus of 1*d.* for hay was holden good, as was also a modus of 6*s.* 8*d.* payable at Easter for *hay*, small tithes and Easter offerings.

Singular determination thereupon by the lords.

As the following singular case of *Gardiner* v. *Poole*, appears to baffle all the rules and principles, by which ancient moduses have usually been adjudged either good or defective; the points are thus reported. In 1705 †, to a bill by the rector for tithes, the following moduses were set up by the defendant, viz. 12*d.* per acre for low meadow, and 8*d.* per acre for high meadow, in lieu of tithe hay; when the court of Exchequer considered them too rank for ancient moduses, but declared them to be temporary compositions, and therefore ordered the tithes to be paid in kind. Upon appeal, however, to the lords, in 1707, they reversed the decree of the Exchequer and established the moduses, ‡ it *appearing to their lordships that the appellant Poole had proved the moduses insisted on by his answers.* The following short statement of this case and appeal, is to be found in *Equity Cases abridged.* "Objection was "made to a *modus*, that it was too great and too near the value of "tithes in kind. Prescriptions had their beginnings before Rd. I, "when it is probable that 12*d.* or 8*d.* per acre might have been "the value of the inheritance: therefore decree in *scac.* to be a "*composition* and not a *modus:* but reversed; for churches might "have been endowed with more than the value of the tithe." These queries must, however, arise upon this determination of the lords, although there be no appeal from it. Were not the moduses laid to have existed from time immemorial? And was there ever a church endowed with a larger income or revenue, than the fund specifically charged with the payment of it would produce?

In 1757, in *Gill* v. *Horrex* §, a *modus* of 4*d.* for every acre of grass cut and made into hay, in lieu of the tithe of *hay*, was objected against as illegal, because it was said, and *so in proportion for a greater or less quantity than an acre.* After two days argument the court took time to consider, and found the *modus* sufficiently set forth. And in the same cause, the court found, that the defendant had stated with sufficient accuracy, that there were some lands in the parish, on which the modus did not attach, although he did not specify in particular, which those lands were.

* Bunb. 161. † 1 Wood, 472. 2 Eq. Ab. 734. 8 Vin. Ab. 18. 1 Rayn. 103. ‡ 7 Bro. Parl. C. 603. § 3 Gwil. 861, from MS.

In *Harrington* v. *Horton*, 1706*, the lords on appeal reversed the decree of the Exchequer, which in a suit for tithe hay had rejected several pecuniary moduses (amounting in the whole to 3*l.* 14*s.* 5*d.*) under the name of *strew tithes:* and they sent several issues to be tried, whether those several moduses had been time out of mind paid, and payable in lieu of *tithe hay* in kind.

Heifer. *Heifer.* A modus of 2*d.* and 3*d.* for each *milk heifer* in full, for the tithe *cow white*, allowed in *Lister* v. *Foy*, A. D. 1703†. Vid. Antea, p. 209.

Modus for hops as a small tithe. *Hops.* It was said in a note in Bunbury ‡, that a *modus* may extend to *hops*, (and clover,) though of late brought into England, if the modus cover all small tithes.

Good modus for some houses. *Houses.* In *Kinnaston* v. *Hattersby* §, 1761, a *modus* of 20*s.* for houses in St. Botolph without, Aldgate, was decreed to the rector impropriate.

Lamb moduses. *Lambs.* In the case of *Lister* v. *Foy*, it was declared to be a good *modus*, that such lambs as are able to subsist without the ewes on St. *Mark's day* are to be tithed; but that such other lambs as are not able to subsist without the ewes on St. Mark's day, are to be tithed when they are able to subsist without the ewes. In *Brinklow and others* v. *Edmunds* ‖, 1731, where the parishioner has 10 lambs, the 10th is due to the rector on St. Mark's day; if 9, the rector is to have one and pay the parishioner an halfpenny; if 8, he is to have one and pay the parishioner a penny. And when 7 lambs, is to have one and pay the parishioner 3½*d*: but for a less number, he is to have no lamb; but is only to have a halfpenny paid him for each lamb under seven. This was established as a good *modus*.

Although it be apparently an unreasonable custom to tithe lambs on St. Mark's day, and had been declared void in *Croft's* case, 1721 ¶, yet, in 1775, in *Bedford* v. *Sumbell* **, the court held, that it ought to go to a jury: and if facts be proved to them, which shew, that in the country, where the question arises, it is unreasonable, they ought to find against it. So in *Webb* v. *Giffard* ††, 1731, the lords upon appeal affirmed a decree of the Exchequer, which had sent the following *modus* to a jury, and therefore of course allowed of it's legality, viz. to pay 3*d.* for every lamb on St. Mark's day, or as soon after as demanded. N. B. The objection was it's rankness, which the courts thought a fact to be sent

* 4 Br. Par. Ca. 624.
† 1 Wood, 422.
‡ *Bate* v. *Sprakling*, Bunb. 20.
§ 3 Wood, 9.
‖ Bunb. 307.
¶ 2 Gwil. 630.
** 3 Gwil. MS. 1058.
†† 7 Br. Parl. Ca. 15.

to a jury. Yet Lord Thurlow said in *Bishop* v. *Chichester* *, A. D. 1787, that "the rankness of a modus depended upon the history "of money, and certainly was in itself a question of fact, and not "of law: but although it were a question of fact, it was a ques- "tion, which the court had frequently decided. This modus, "(which was *3d. for every lamb, in lieu, full satisfaction, and dis- "charge of the tithe of such lamb, and of the tithe wool of such lamb "shorn from such lamb in the same year,)* was notoriously rank: "and if so, there was no reason, why a court of equity should di- "rect an issue to try a fact, of which it was perfectly satisfied."

Lead, lime, &c.

Lead, lime, (also marle, bricks, slates, and tiles) were declared not to be titheable, unless the *custom of the place* make them so. A. D. 1615, in *Thomas* v. *Perry* †.

Milk moduses.

Milk. In 1719, in *Roe* v. *Bishop of Exeter*, the following *milk moduses* were established, viz. 1st, for every cow having a calf for the tithe of the milk and the calf 17*d.* 2°, for every milch cow milked without a calf, 11*d.* for the tithe of the milk; 3°, for every heifer, the first year she has a calf, 13*d.* for the milk and calf. In 1709, in *Wright* v. *Elderton* ‡, a *modus* of 6*d.* for every cow in lieu of the tithe milk, is due to the parson of the parish, where the cows are kept, though milked in another parish. In 1768, in *Boscawen* v. *Roberts* §, a *modus* to pay 6*d.* at Michaelmas for every cow, in lieu of tithe milk and calves was allowed of. So again in the before-mentioned case of *Phillips* v. *Symes*, the modus before-mentioned, (p. 209) of 8*d.* for every cow, and 4*d.* for every heifer, in lieu of milk and calves of such cow and heifer was allowed of.

Modus for mills.

Mills. That there may be a good pecuniary modus for a mill, appears from the case of *Talbot* v. *May* ‖, 1743, before Lord Hardwicke, where a modus of 6*s.* 8*d.* was pleaded to a bill for the tithes of a mill; although the plea were there over-ruled from mispleading, not from the illegality of the modus. N. B. In that case it was said, that the reason the cases go upon, why a modus is destroyed, where two stones are erected instead of one, is, because the miller can grind a double quantity. As to the destruction of *mill moduses*, by the act of God and the act of man, the following distinction has been taken, viz ¶. where there has been an ancient corn mill, for which a modus has been immemorially paid, and afterwards the mill stream changes it's course, and the

* 4 Gwil. 1316, from a MS. of Mr. Cox.
† God. Rep. Can. 417.
‡ 1 Wood, 518.
§ 3 Wood, 174.
‖ 3 Atk. 17.
¶ 1 Rol. Ab. 641.

owner pulls down the mill and re-erects it on the new course of the stream, this shall be still discharged of tithe by the ancient modus: otherwise would it have been, had the old mill been demolished and the new one erected on the same spot, or an additional mill built by the owner, as was adjudged in B. R. 1635, in *Johnson* v. *Dundridge*.

Orchard. *V. antea.*

Orchard. See what has been before said under the head *garden*, for under the word *gardinum*, it has been before said, an orchard could only have been affected, or at least demanded in a writ of right.

Park modus.

Park. If a park covered by an ancient *modus* be disparked, and the land converted into tillage or hop ground: though the tithes be not payable, yet the modus shall remain: and the law is the same, if it be disparked by throwing down the pales, which is the legal way of disparking *. A modus of a buck and doe was allowed to be good for all tithes: for although they be *feræ naturæ* (as pheasants, &c.) yet they may be paid or given as moduses: as a great tree, which is not titheable itself, may be given for other trees, that are titheable. If there be a modus to pay 2*s.* for a park, and also a shoulder of every buck killed in the park, and all the deer die or are killed up, yet the prescription holds good for the 2*s* †. To a bill for tithe of corn growing on disparked land, a modus was set up to pay a buck yearly, in lieu of all tithes: but not particularly out of that park: the custom was allowed to be kept up by payment of a buck out of any park ‡. But had the payment of the buck been restricted to that particular park, the disparking would have annulled the custom.

Pig modus.

Pig. A like modus for pigs was established as for lambs, in *Brinklow* v. *Edmonds*, vide before, p. 216. In 1798, in *Mantell* v. *Pain* §, a custom to pay one pig, where the number farrowed was 7, and did not exceed 10, and to pay nothing, where the number was under 7, was allowed to be good.

Rate tithe.

Rate-tithe ‖ is what is paid according to the *custom* of the place, for the feeding of sheep and all other cattle, except labouring oxen and young breed of cattle for the pasture and increase thereof, whether they feed on the common or elsewhere.

Custom to pay tithe of roots, &c.

Roots of coppice woods grubbed up, shall not pay tithe *unless by custom* ¶.

* *Poole* v. *Reynolds*, God. R. C. 427; and *Sharp* v. *Sharp Ney*, 148.

† God. R. C. 428. ‡ God. R. C. 428, who quotes Yourshie's case at York assizes, 13 Car. Clayt. Rep. 91. § 4 Gwil. 1504.

‖ God. Rep. Car. 437. ¶ God. 436, that they are not titheable de jure vide Mar. 58, *Porter* v. *Skinner*.

Salt. It was holden in 1618*, that *by custom* tithe should be paid of white salt, in *Jones* v. *Gower*, B. R. Do. salt.

Sheep. Vide what has been before said of them under the heads *agistment and lambs*. In 1731, in the often cited case of *Brinklow* v. *Edmonds*, 1½ payable on shear day, for the wool of each sheep dying between Candlemas and shear day, was established as a good modus. As was also the *modus* of 4*d.* per month payable on shear day, for the tithe of wool of every hundred sheep shorn in the parish, which were brought into it after the 2d day of February, and kept till shearing day, and after that rate for every less number of sheep, and for a less time. In 1726, in *Thompson* v. *Holt* †, a *modus* was established of 8*d.* for every score of sheep wintered in other parishes, in lieu of the tithe wool. And in 1724, in the before-mentioned case of *Phillips* v. *Symes*, and *e contra*, 3*s.* 4*d.* was admitted as a good *modus* for every score of sheep shorn out of the parish, and so proportionably for a greater or less number than twenty, or for a less time than a year, for the wool and lamb of such sheep. Sheep modus.

In 1790, in *Ellis* v. *Saul and others*, the following *modus* of paying for sheep and wool was admitted good: viz. a customary mode of tithing sheep, paying one penny per head for sheep brought into the parish after Candlemas, and clipt in the parish, in lieu of tithe of wool; three-pence per head, for sheep in the parish before Candlemas, and carried out before shearing time, as an average payment for the wool carried out will be good. The latter payment may be applicable to the wool tithe, though not then due.

Wool. See what has been said of it in the preceding head, *sheep*. In the before-mentioned case of *Green* v. *Hun*, A. D. 1598, a custom to pay tithe wool at Lammas day was allowed to be good. Wool modus.

* God. 438. † 2 Wood, 969.

BOOK III.

CHAP. I.

Of the Remedies for enforcing Payment of Tithes, and other Suits concerning them, in the Ecclesiastical Courts.

What ecclesiastical courts are.

NO part of the jurisprudence of this country has been more misconceived and misrepresented, than the whole system of our *Spiritual, Ecclesiastical, or Christian* courts. In order to entertain just and explicit ideas of them, it is requisite very nicely to discriminate between the pure spiritual power, (that is, *the power of the keys*,) of church governors over their flocks, and the rights and powers vested in particular clergymen by that civil establishment, which the state gives or allows to the religion, of which they are ministers. Many circumstances have concurred to produce this confusion. These courts were instituted many centuries before the Reformation, when the established religion admitted a *spiritual* supremacy of jurisdiction in the see of Rome: and during all that time the nation did not in all things restrict the pope to the exercise of that merely spiritual jurisdiction, which they allowed him as supreme bishop and ordinary of the universal church; but they allowed him a very considerable portion of the headship, supremacy, or executive primacy of that civil establishment, which the nation then thought fit to grant to their clergy; and which, uniting in the same individual, the bulk of the community erroneously presumed to have been derived from one and the same source. It might have been desirable, that the clergy at no time had ever rested their claims to rights, powers, and authorities, but upon the real grounds and sources, from which they were actually derived. The most select set of men is not exempted from the infirmities of human nature; and it is to be feared, that the clergy found an interest in propagating the ideas of their holding all their civil rights, immunities, and privileges, by the same divine tenure, by which their flocks readily admitted them to possess their true *spiritual jurisdiction* over them. These courts were continued after the Reformation, and still subsist upon the same principles,

The nation formerly allowed the pope a part of the headship of the *civil* establishment.

Erroneous derivation of clerical rights.

are governed by the same rules, decide by the same civil (that is, *Justinian's*) code of law, and differ no otherwise from the like institutions before the Reformation, than by the abolition of the appeal in the *dernier resort* to the court of Rome. The occasion rarely happens for analyzing different powers or causes, when the effect produced by any of them is neither questioned nor resisted. Provided a sentence of the ecclesiastical court be to be carried into effect, little avails it for the person, who is bounden by it to know, whether the jurisdiction of the judge, who pronounced it be holden immediately *jure divino* or *jure humano*. It is the law of the land in a thing lawful, and that suffices to bind every subject to obedience.

The same principles of real spiritual power and jurisdiction prevail now as before the reformation.

It is absurd to suppose, that the power and jurisdiction of the spiritual or ecclesiastical courts were formerly derived from any other source, than what they now are. Before the Reformation the bishops, who were the heads or judges of their respective courts, received by the act of their * confirmation from the pope that spiritual jurisdiction, to which was annexed a right of externally acting upon objects purely of a spiritual nature: and as such objects cannot at the same time be objects of the temporal power, it follows, that since such act of confirmation has been performed by English prelates, the law considers it to produce the same effect it formerly did. It rarely happens, though it possibly may, that any act of the spiritual or ecclesiastical court affects merely an object of the spiritual power. When these courts are viewed, as Sir *Matthew Hale* observes, with reference to their external jurisdiction in *foro contentioso*, they are then rightly considered, as purely civil or temporal, inasmuch as they are with this view created, supported, and maintained, merely by the civil or temporal power, and acquire their whole force and authority from the civil magistrate of that community, in which they are established, or which chuses to submit to their authority and jurisdiction. It would be equally absurd to look for any divine mission or authority, or special guidance of God in the old judges of the consistory or other courts of Rome, to which our ancestors in appeal resorted, as it would be ridiculous to expect a peculiar gift of divine grace and inspiration in a modern surrogate or proctor of Doctors' Commons,

* By common law an English bishop elected under a *congé d'elire*, consecrated or even invested with the temporalities by the king, was not a complete bishop till he was confirmed by the pope, as appears by the Year-book, (Hil. 41 Ed. III. 6.) "Although "he be elected, it behoveth him to be confirmed by the pope: and it may be, that the "pope may refuse him for non-ability or other cause."

whither we now carry our suits of the like nature. But these courts may be considered in another point of view, though they seldom act otherwise than in exercise of that external forensic jurisdiction, which they receive from the civil magistrate. Our laws assume, that the government of the church is perfect in its nature: now the supremacy and compulsory powers of the governors over the governed, are requisite to the perfection of every government*: and "as the church itself is a visible society of human "individuals, and for the due exercise of religion, it is required, "that open profession of it be made by each individual, so as to "be seen by others," it follows, that the governors of this society must be invested with powers of enacting and executing by external means, such ordinances and practices, as concern the exercise of religion. This imports no power of external coercion. But it supposes a right of judging: and judgment implies the right of investigating, which can only be made by examination of facts. If therefore a Christian bishop, or church governor, hold spiritual jurisdiction over his flock by *divine right*, and thereby have fundamental authority to judge, censure, and excommunicate a human being subject to his jurisdiction, which are public and external acts, he must by necessary consequence possess the right, power, and authority of examining witnesses, and making the necessary inquiries into the facts, upon which alone he can form his judgment. The principal power carries with it all incidental rights and consequences. As far then as a Christian bishop is empowered to exercise his external jurisdiction over his spiritual subjects independently of the civil power, (that is, to the whole extent of his spiritual mission,) so far has he in his own diocess a right to enquire, examine, pronounce, and execute judgment: but the matter or object of the judgment, and the judgment itself, must be purely spiritual, and within the resort and competency of the spiritual power†. *Gerson*, the chancellor of the university of Paris, defined the spiritual power, "a power instituted by Jesus Christ, which has "for its object a spiritual thing, and tends to a supernatural end."

Our laws assume the perfection of church government.

The right of judging carries with it the right of investigation and examination.

Original episcopal jurisdiction extends to those things only, which are out of the competency of the temporal power.

As the power of examining, judging, and pronouncing sentence upon pure spiritual matter is inherent in every Christian bishop in-

Spiritual power commands no

* Warburton's Alliance, p. 51, Hurd's edition.

† Thus says Warburton, (p. 127, Hurd's edit.) "For as to what is purely episcopal, "that is, spiritual in the prelate's office, his superintendency over the clergy of his dio-"cess, there is no need of a court of judicature to assist him in the discharge of it." And (p. 128.) he says "Ecclesiastical courts were erected to take care of those things, "which civil courts were incapable of inspecting."

dependently of the state, it carries with it no establishment of any public contentious or forensic court: much less any coercive or compulsive powers of enforcing their process and sentences by civil and coercive means. Thus, during the three first centuries of christianity, were all judgments upon spiritual matter given and enforced by the governors of the church: and then no other than spiritual matter came before them, for they had no aid of the magistrate to affect any objects of the temporal or civil power.

external coercive means.

The civil establishment, which this nation first gave to the Christian religion, took away nothing of the rights and powers annexed to the governors of the Christian church. Whatever they could do before the civil establishment was granted, that they retained the power of performing after it was established, independently of the state: for the rights and powers, which by their order or jurisdiction they were entitled to, never could be surrendered into the hands of the civil magistrate.

A civil establishment derogates not from the pure spiritual power.

When by the municipal law of the land ecclesiastical or spiritual courts were erected, they required all the necessary requisites for civil courts; that is, they were made contentious, forensic, and public: and every thing, that seemed even remotely to affect churchmen or church property, was brought under their cognizance. They proceeded according to the rules of the civil (Roman) and canon law: and the appeal, which was formerly from the archbishop to the pope, has been since the Reformation from the archbishop to the king in chancery, where delegates are appointed to revoke or confirm the sentence. We must always recollect, that the Roman civil law, and the canon law have no binding force or obligation upon British subjects, but in as much as they are adopted by the British nation *: I speak not of such parts of the canon law as enjoin matter of a pure spiritual nature. The ecclesiastical laws, by which these courts proceed, are subject to the municipal laws of the land. For as the laws and statutes of the realm have prescribed to the ecclesiastical courts their bounds and limits, so the courts of common law have the superintendency over them, to keep them within the limits of their jurisdiction; and to judge and determine, whether they have exceeded those limits or not, and to act accordingly. This is consonant with the reason of the fact; for these courts were instituted by the will of the community, and therefore they must remain liable to that

How the bishop's forensic jurisdiction came to be confounded with his pastoral.

* Sir M. Hale's Hist. Com. Law, 41. 1 Hale's Pl. Cr. 408.

power, by which they subsist. The establishment of these courts neither weakened nor abolished the bishop's spiritual power over his flock: but as from their establishment he came to exercise it sometimes in open court, and in a public forensic manner, by a natural inattention to the objects of the suits, and from the inadvertent application of the term *spiritual* to the court, in which a *spiritual* person presided, and from the general confidence, which the faithful in those days placed in the prelates of the church, it was generally supposed, that whatever act, decision, or sentence proceeded from the bishop in his own court was an act of his *pastoral jurisdiction*, which he was allowed to enjoy by *divine right*, independently of the civil magistrate. The inference then was, that what was holden by divine right, could not be amenable to temporal power.

The true discrimination between them.

The external and forensic judicial capacity of the bishop could not authorize him to perform those things, which by his pastoral jurisdiction he was by divine right enabled to do. As to all things therefore, which the bishop was empowered to do in court, which without a court he might not have enjoined and enforced independently of the civil magistrate, the bishop is to all intents and purposes one of the king's judges: and as to all matters, which by virtue of this forensic judicial capacity he is enabled to perform, he received his jurisdiction immediately from the king, who appoints him the judge of this court. Rare indeed are the applications to these courts upon pure spiritual matter, which is out of the controul or competence of the civil magistrate. Wherever that is not the case, there the ecclesiastical court solely depends upon the sovereign power of the state, which gave rise to and upholds its continuance.

The distinct sources from which their acts flow.

From what has been said, it follows, that the whole ground upon which such governors can exercise any external judicial power over their respective flocks, independently of the state, is their spiritual jurisdiction or mission, which they have received to feed, govern, and superintend a particular part of the fold of Christ. This they receive not from the civil magistrate; nor do the objects, upon which it can operate, fall under the competence or resort of the civil or temporal power. Thus every judicial act or form of process or sentence, or decree or injunction of a spiritual or ecclesiastical court in England, which is an effect of the power of the keys, acquires not force and efficacy from the authority of the king or parliament, but exclusively from the divine

source, from which the church of England assumes the apostolical mission, to emanate *.

Church governors cannot surrender any particle of the pure spiritual jurisdiction.

It follows then, that no governors of the whole or any part of the church of Christ can upon any account, or upon any occasion, or in any manner, for themselves or their successors, surrender into the hands of the civil magistrate any particle of that power or jurisdiction, which by divine right or institution is annexed to their order and authority. Thus says Sherlock, in his *Summary of the Controversies between the Church of England and the Church of Rome*, p. 119. "If bishops will not exercise that power, which "Christ has given them, they are accountable to their Lord for it, "but they cannot give it away, neither from themselves nor from "their successors, for it is their's only to use, not to part with it. "And therefore every bishop may (he should have said ought) re-"assume such rights, &c." They cannot upon any human grounds, motives, or considerations whatsoever, bind or fetter themselves in the exercise of their power and jurisdiction, when-

Sherlock's authority for this position.

* The nature of episcopal power in the ecclesiastical courts is very fully and fairly set forth by Dr. Carleton, Bishop of Chichester, in his Treatise of Jurisdiction Episcopal, Regal, and Papal, c. i. p. 8, 9. "The question between us and them is only of juris-"diction coactive in external courts, binding and compelling by force of law, and other "external mulcts and punishments, besides excommunication. As for spiritual juris-"diction of the church, standing in examination of controversies of faith, judging of he-"resies, deposing of heretics, excommunication of notorious offenders, ordination of "priests and deacons, institution and collation of benefices and spiritual cures, &c. "(N. B. He does not say *induction* into, or *investiture* of, temporalities.) This we re-"serve entire to the church, which princes cannot give or take from the church. This "power has been practised by the church without coactive jurisdiction, other than of "excommunication. But when matters handled in the ecclesiastical consistory are not "matters of faith and religion, but of a civil nature, which yet are called ecclesiastical, "as being given by princes, and appointed to be within the cognizance of that consis-"tory, and when the censures are not spiritual but carnal, compulsive, coactive, here "appears the power of the civil magistrate. This power we yield to the magistrate; "and here is the question, whether the magistrate has right to this power and jurisdic-"tion? This then is that which we have to prove, that ecclesiastical coactive power by "force of law, and corporal punishment, by which Christian people are to be governed "in external and contentious courts, is a power, which belongs rightly to Christian "princes." And again, (p. 42.) "Concerning the extention of the church's juris-"diction, it cannot be denied, but there is a power in the church not only internal, "but also of external jurisdiction. Of internal there is no question made. External "jurisdiction being understood all, that is practised in external courts or consistories, is "either definitive or mulctative. Authority definitive in matters of faith or religion be-"longs to the church: mulctative power may be understood either, as it is with coac-"tion, or as it is referred to spiritual censures. As it stands in spiritual censures, it is "the right of the church, and was practised by the church, when the church was with-"out a Christian magistrate, and since. But coactive jurisdiction was never practised "by the church, when the church was without a Christian magistrate, but was always "understood to belong to the civil magistrate, whether he were Christian or heathen."

ever the cause of religion calls for it. And if in any instance they have swerved from their duty in attempting to make a surrender of their rights, powers, and jurisdiction, it is their duty to re-assert and exercise them independently, and even if occasion call for it, in defiance of the *civil magistrate*.

Authority of Primate Bramhall to the same point.

Dr. Bramhall*, Archbishop of Armagh, has most explicitly delivered his sentiments upon this point: "My 4th, and last "ground, (says he,) is, that neither King Henry VIII. nor any "of our legislators, did ever endeavour to deprive the Bishop of "Rome of the power of the keys, or any part thereof; either the "key of order, or the key of jurisdiction: I mean, jurisdiction "purely spiritual, which hath place only in the inner court of con- "science, and over such persons, as submit willingly: Nor did "they ever challenge, or endeavour to assume unto themselves, ei- "ther the key of order, or the key of jurisdiction, purely spiritual. "All which they deprived the pope of, all which they assumed to "themselves, was the external regimen of the church by coactive "power, to be exercised by persons capable of the respective "branches of it. This power the Bishops of Rome never had, or "could have, justly over their subjects, but under them, whose "subjects they were. And therefore, when we meet with these "words, or the like (that no *foreine prelate shall exercise any man- "ner of power, jurisdiction, superiority, preheminence, or privilege, "ecclesiastical or spiritual, within this realme,*) it is not to be under- "stood of internal or purely spiritual power in the court of con- "science, or the power of the keys: (we see the contrary practised "every day,) but of external and coactive power in ecclesiastical "causes, in *foro contentioso*. And that it is, and ought to be so "understood, I prove clearly by a proviso in one main act of par- "liament, and a canon in the English church." His grace then reciting the proviso in the acts of the canons †, thus concludes: "You see the power is political, the sword is political, all is po- "litical. Our kings leave the power of the keys and jurisdiction "purely spiritual, to those, to whom Christ hath left it." Again the same learned prelate adds, (p. 161.) "Our ancestors cast out

* Schisme Guarded, p. 6.

† The canon alluded to is the xxxviith, which is expressed in the following words: "We do not give our kings either the administration of God's word or sacraments, "which the injunctions published lately by Queen Elizabeth doe most evidently declare, "but only that prerogative, which we see to have been always attributed to all godly "princes by himself in holy scripture: that is, to preserve or contain all estates and or- "ders committed to their trust by God, whether they be ecclesiastical or civil in their "duties, and restrain contumacious offenders with the civil sword.

"external ecclesiastical coactive jurisdiction; the same do we. "They did not take away from the pope the power of the keys, "or jurisdiction purely spiritual; no more do we. p. 170. What- "soever power our laws did divest the pope of, they invested the "king with it; but they never invested the king with any spiri- "tual power or jurisdiction, witnesse the injunction of Queen "Elizabeth, witnesse the public articles of our church, witnesse "the professions of King James, witnesse all our statutes them- "selves, wherein all the parts of papall power are enumerated, "which are taken away:" (which he then enumerates,) and adds, "But of them all there is not one, that concerneth jurisdiction "purely spirituall, or which is an essentiall right to the power of "the keys." The learned primate had before said, p. 73. "Now "reader take a stand and looke about thee; see among all these "branches of papall power, which were cast out of England, if "thou canst find either of St. *Peter's Keys*, or his *primacy of order*, "or his *beginning of unity*, or any thing, which is purely spiritual, "that hath no other influence, than merely the court of con- "science."

The same point maintained by Gibson and others.

These ideas are far from being antiquated: they have been clearly set forth and strongly urged by Dr. Gibson, whose book is looked up to as the first authority by Dr. *Burn*, *Watson*, and all other writers, who have since handled any of these subjects *. This reverend divine sets out in his introduction † by drawing the attention of his readers to this distinction, by repeating one of the questions put at the consecration of a bishop in the church of England. "The archbishop.—Will you maintain and set forward, "as much as shall lie in you, quietness, law, and peace, among "all men; and such as be unquiet, disobedient, and criminous, "within your diocese, correct and punish, according to such *au-* "*thority* as you have *by God's word*, and as to you shall be com- "mitted *by the ordinance of this realm?*"

"Answer.—I will so do by the help of God."

"This plain recognition of the right, which the bishops of the "church of England have to exercise discipline upon the fact of "divine, as well as human, authority, was in the first book of "Edward the Sixth, and hath ever since continued part of the "form of consecration, and, by consequence, hath been confirm- "ed by parliament, four several times; viz. by the act of Edward

* Codex juris Ecclesiastici Anglicani, 2 vols. folio, 1713, vid. his Introduction to *The Complete Incumbent*, by Dr. Watson, or rather by Mr. Place, 1 Bur. 315. *dictum* P. Denison *Justice ut antea.* † 1 Gibs. Introd. xvii.

"the Sixth, and in three several acts of uniformity, whereby the "forms of consecration and ordination have been confirmed, toge- "ther with the book of Common Prayer." The learned Doctor considers this plain distinction in a legal sense against those, who contend, that the supposing a jurisdiction in the church by divine right, is inconsistent with the principles of the Reformation: and adds, it is by way of distinction from this, that Judge *Hale* (speaking of the legal power of bishops,) called it jurisdiction in *foro exteriori*; which is confessed on all hands to be derived from the crown, viz. the external exercise and administration of justice and discipline in such courts, and in such ways and methods, as are by law or custom established in this realm. And after all the stress that has been laid upon the forementioned statute of Edward the Sixth, in order to prove the church to be a mere creature of the state; whoever attends to the language and tenor of that statute, will find it highly probable, that no more was originally intended by it, than what Judge *Hale* meant by jurisdiction in *foro exteriori*. There the grievance recited is, That the bishops did use (to do what? not to plead, that they had a general authority from the word of God, to exercise discipline in the church, but) to make and send out their summons, citations, and other process, in their own names: and because all courts ecclesiastical be kept by no other power or authority, either foreign or within the realm, but by the authority of his most excellent majesty, therefore it is enacted, That all summons, citations, or other process ecclesiastical, shall be made in the king's name. All this is forensic language; as is also the seal of office, and the seal of jurisdiction, in the next clause; in which seal the arms of the king were to be engraven, that it might appear in the course of every process, that they held not their courts (as the people had been accustomed to think they did) by virtue of a foreign or papal power. But, the act having been abrogated in the reign of Queen Mary, there was no occasion to revive it under Queen Elizabeth, after the supremacy was fully established, and the popish bishops were deprived, and no thought or suspicion remained of English prelates holding their courts by the authority from Rome.

This doctrine not inconsistent with the principles of the Reformation.

Although the law, by which the ecclesiastical courts now decided, be the Roman (Justinian's) code, and yet the adoption of that law, was accidental to our old English ecclesiastical courts, or courts Christian, as they were originally called. It was not so from the beginning.

Origin of ecclesiastical forensic jurisdiction.

[a] For the first three hundred years after Christ no distinction of ecclesiastical or spiritual causes, in point of jurisdiction, was known in the Christian world; for the causes of testaments, matrimony, bastardy, adultery, and the rest, which are now called ecclesiastical or spiritual causes, though merely civil in their nature, were then determined by the rules of the civil law, and subject only to the jurisdiction of the civil magistrate. But after the emperors were become Christians, out of a zeal and desire they had to honour church governors or bishops, they singled out certain special causes, wherein they granted jurisdiction to bishops; namely, in *cases of tithes*, because paid to men of the church; in causes of matrimony, because marriages were for the most part solemnized in the church; in causes testimentary, because testaments were many times made *in extremis*, when churchmen were present giving spiritual comfort to the testator, and there they were thought the fittest persons to take the probates of such testaments: and so of the rest. Yet these bishops did not then proceed in these causes according to the canons and decrees of the church, (for the canon law was not then made,) but according to the rules of the imperial law, and as the civil magistrate proceeded in other causes. Accordingly in this kingdom, in the Saxon times, before the Norman conquest, there was no distinction of jurisdictions; but all matters, as well spiritual as temporal, were determined in the county court called the sheriff's tourn, where the bishop and earl (or in his absence the sheriff) sat together; or else in the hundred court, which was held in like manner before the lord of the hundred and the ecclesiastical judge.

Formerly the bishop and sheriff sat together in the county court.

Sir *Henry Spelman* observes, that the bishop and the earl sat together in one court, and heard jointly the causes of church and commonwealth, as they yet do in parliament. And as the bishop had twice in the year two general synods, wherein all the clergy of his diocess were bounden to resort for matters concerning the church; so also there was twice in the year a general assembly of all the shire for matters concerning the commonwealth, wherein without exception all kinds of estates of the laity were required to be present, as dukes, earls, barons, and so downward; and especially the bishop of each diocess among the clergy. For in those days the temporal lords did often sit in synods with the bishops, and the bishops in like manner in the courts of the temporalty, and were therein not only necessary, but principal judges

[a] Vide 1 B. E. L. 409. 4to. edit.

themselves. Thus by the laws of King Canutus, " The *shyre-gemot* (for so the Saxons called the assembly of the whole shire) " shall be kept twice a year, and oftener if need require, wherein " the bishop and the alderman of the shire shall be present; the " one to teach the laws of God, the other the law of the land." And among the laws of King Henry the First, it is ordained; " first, let the laws of true christianity, (which we call the eccle- " siastical) be fully executed with due satisfaction; then let the " pleas concerning the king be dealt with; and lastly, those be- " tween party and party: and whomsoever the church synod shall " find at variance, let them either make accord between them in " love, or sequester them by their sentence of excommunication." Whereby it appears, that ecclesiastical causes were at that time under the cognizance of this court. But these, he says, he takes to be such ecclesiastical causes, as were grounded upon the ecclesiastical laws made by the kings themselves for the government of the church, (for many such there were in almost every king's reign,) and not for matters rising out of the Roman canons, which were determinable only before the bishop and his ministers. The bishop first gave a solemn charge to the people touching ecclesiastical matters, opening unto them the rights and reverence of the church, and their duty therein towards God and the king, according to the word of God. Then the alderman in like manner related unto them the laws of the land, and their duty towards God, the king, and commonwealth, according to the rule and tenure thereof. The separation of the ecclesiastical from the temporal courts, was made by William the Conqueror.

Separation of the ecclesiastical from the temporal courts.

It is obvious, that whilst the bishop and sheriff, (or the earl,) sat and judged jointly in the same court, they decided by one and the same law. This appears from what was said or referred to in the case of *Marriott* v. *Marriott* *, which case turned upon the right of a court of equity to enquire into the fairness of a residuary bequest of personal estate after probate granted by the spiritual court. In England the bishop and sheriff sat together in the court, as it appears by the laws of King Edgar, cap. 5. de comitiis †. " *Centuriæ comitiis quisque (ut ante præscribitur) interesto: oppidana* " *ter quotannis habeantur comitia: celiberrimus autem ex omni satra-* " *piâ terquotannis conventus agatur, cui quidem illius diœcesis epis-* " *copus et senator intersunto, quorum alter jura divina, alter humana* " *populo edoceto.* Leges Canut. c. 17. *de comitiis municipalibus.*

* 1 Str. 669. in Scac. † Wilk. 78. Lamb. Sax. Laws, 69.

"Et ter in anno habeantur comitia municipalia, et duo conventus pro-
"vinciales, aut plures etiam, et illis intersit episcopus ac senator, et
"ibi ubique doceatur tam jus divinum quam humanum."

From these laws it plainly appears, that the probate of testaments was in the county courts. William the Conqueror was the first, that separated the ecclesiastical court from the civil. Selden, in his notes upon *Eadmerus* 167. gives us the very charter of such separation. *Propterea mando et regiâ authoritate præcipio, ut nullus episcopus vel archidiaconus de legibus episcopalibus amplius in hundred. placita teneat: nec causam quæ ad regimen animarum pertinet, ad judicium secularium hominum adducant.* This charter *, as Mr. Selden has told us, was recited in a close roll of Rich. II. and then was confirmed.

Introduction of Justinian's code into England by the clergy.

The late Mr. Justice Blackstone † attributed the introduction of the Roman civil law into England, to the accidental discovery of a copy of Justinian's pandects at *Amalfi*, about the year 1130, within the first century after the conquest: and to the prepossessions of the foreign clergy for that code, many of whom under William and his immediate successors, obtained the first dignities in the church of England. The laity persisted in opposing, and the clergy in imposing the civil code. Each party succeeded in their efforts; inasmuch as by the sturdy resistance of the laity, it never gained admittance into the common law courts; and by the powerful influence of the clergy it was adopted in their own courts Christian, to the total exclusion of the old laws before used in them.

Sir Matthew Hale's opinion hereon.

No man ever spoke of the binding quality of these laws with more precision, than that great and constitutional lawyer Sir *Mat. Hale* ‡. Neither the canon nor the civil law have any obligation as laws within this realm, upon any account that the popes or emperors made those laws, canons, rescripts, or determinations, or because Justinian compiled their body of the civil law, and by his edicts confirmed and published the same as authentic, or because this or that council or people made those canons or decrees, or because Gratian or Gregory, or Boniface or Clement, did (as much as in them lay) authenticate this or that body of canons or constitutions; for the King of England doth not recognize any foreign authority as superior or equal to him in this kingdom, neither do any laws of the pope or emperor, as they are such, bind here:

* Vide the Charter, App. No. XL. † 1 Bl. Com. 17. ‡ History of the Common Law, 27.

but all the strength that either the papal or imperial laws have obtained in this kingdom, is only because they have been received and admitted either by the consent of parliament, and so are part of the statute laws of the kingdom, or else by immemorial usage and custom in some particular cases and courts, and no otherwise; and therefore so far as such laws are received and allowed of here, so far they obtain and no farther; and the authority and force they have here is not founded on, or derived from themselves; for so they bind no more with us, than our laws bind in Rome or Italy. But their authority is founded merely on their being admitted and received by us, which alone gives them their authoritative essence, and qualifies their obligation.

What force the canon law has in England.

And hence it is, that even in those courts, where the use of those laws is indulged, according to that reception, which hath been allowed; if they exceed the bounds of that reception by extending themselves to other matters than hath been allowed to them; or if those courts proceed according to that law, when it is controuled by the common law of the kingdom, the common law doth and may prohibit and punish them. And it will not be a sufficient answer for them, to tell the king's courts, that Justinian or Pope Gregory have decreed otherwise. For we are not bound by their decrees further, or otherwise, than as the kingdom here hath as it were transposed the same into the common and municipal laws of the realm, either by admission of, or by enacting the same, which is that alone, which can make them of any force in England.

The received part of the canon law is a part of the *common law*.

Enough, it is hoped, has been urged to prove, beyond question or doubt, that the spiritual courts acting upon objects within the competency of the civil or temporal power have all the common incidents of ordinary courts of judicature; and their constitution and power make as much a part of the common law of the land, as those of any of the common law courts, or of the courts of equity. The formation, principles, and practice of our ecclesiastical or episcopal courts are not merely to be drawn from any documents, proofs, or maxims of the Roman, canon, or civil law; but from the state of their actual existence in this country from time immemorial. Barring therefore any special provision of statutes, which shall be orderly noticed, as they occur, it behoves us to consider generally the nature, practice, usages, and process of those spiritual or ecclesiastical courts, which have any cognizance of tithe causes, before we examine, either the parties, who are entitled to be suitors,

or the specific objects, which may be sued for in such courts, confining our observations thereupon to process relative to tithes.

Having endeavoured to shew, that these external or forensic spiritual courts proceed generally (and almost exclusively) upon objects of temporal or civil power, we shall wholly drop the consideration of whatever primitive pure spiritual jurisdiction they may (though they seldom do) exercise in right of their mere Christian episcopacy; and speak of them, with reference to their cognizance of tithes, as of any other court of judicature, whether of the common law, courts of equity, or courts of admiralty; which latter, like courts Christian, generally decide by the rules and maxims of the civil, Roman, (or Justinian's) code. It has before been observed, that amongst our Saxon ancestors the bishops were admitted together with the earls or sheriffs, in the hundred courts to a common participation of the administration of justice; and that from the time of the Conqueror only, they had their separate courts: and when their separate courts were allotted to them, the specific objects of their cognizance in those separate courts were also particularly marked: of which the clergy's maintenance, or tithes, being a principal head of the *civil* establishment of religion was the most considerable. It must be noted, that when our statutes and books speak of different objects being within the competence or under the jurisdiction of the spiritual and not of the temporal courts, they refer only to the distinction, allotment, or specification of the objects of adjudication then fixed and determined by the legislature or supreme civil magistrate; but they refer not all to *that other authority* which Dr. Gibson says *, *our constitution acknowledges to belong to every bishop by the word of God.* The effect then of this distribution or splitting of forensic jurisdiction into *spiritual* and *temporal*, upon the secession of the *bishops from the hundred courts*, not unlike the distribution of the powers of the *aula regia* under Edw. I. into the separate courts, as they exist at this day at *Westminster* was, that each bishop had thenceforth his own court, which in process of time acquired the general term of *Consistory Court.*

Certain specific objects allotted to the jurisdiction of the spiritual court tho' general objects of temporal power.

According to Sir Edw. *Coke* †, "The consistory court of every "archbishop and bishop of every diocess, in ecclesiastical causes, "is holden before his chancellor in his cathedral church, or before "his commissary in places of the diocess far remote and extant "from the bishop's consistory, so as the chancellor cannot call

Consistory courts.

* 1 Gibs. xvii. † 4 Ins. 338.

"them to the consistory, without great trouble and vexation: and "he is called *Commissarius forqneus*." It will be observed then, that each diocess has its consistory court: which is the proper and first ecclesiastical court of the ordinary: and all the several subordinate ecclesiastical tribunals within the diocess are of course dependent upon the consistory court. This is fully demonstrated by the order or gradation of appeals in the ecclesiastical jurisdiction. When the *civil magistrate* was superadded to the person possessing the *pure spiritual* pastoral rights of a Christian bishop, the forensic jurisdiction of the courts, in which they jointly presided, was by a pious fraud holden out to the public as proceeding from the same source as the purely episcopal authority, in order the more effectually to enforce submission and obedience.

Order of appeals in spiritual courts.

The gradations or stages of forensic appeals were consequently adapted to the received notions of the pure spiritual powers of the hierarchy, which in England before the Reformation carried the supremacy to the pope, as to the supreme ordinary of the universal church; whereas since the Reformation the last really spiritual appeal was directed as far as the civil magistrate could direct it, to be confined to the national archbishop of each province; and the last forensic appeal was directed as the civil magistrate was evidently enabled (and perhaps bounden) to direct it to be carried to the king in chancery. Sir Edward *Coke* very distinctly gives us the several degrees of ecclesiastical appeals *, "The court of the archdeacon or "his commissary, is to be holden where and in what places the "archdeacon, either by prescription or composition, hath jurisdiction "in spiritual causes within his archdeaconry. And from him the "appeal is to the diocesans: he is called *Oculus Episcopi*.

Lord Coke's opinion of spiritual appeals.

"The clergy petitioned in parliament † that of every consulta- "tion conditional, the ordinary may of himself take upon him "the true understanding thereof, and therein proceed accordingly.

"Whereunto the king's answer was, That the king cannot de- "part with his right, but to yield to his subjects according to law. "*Nota hoc, et stude bene.*"

Appeal to delegates.

"The court of delegates, and consequently of appeals, is so vul- "garly called, because these delegates do sit by ‡ force of the "king's commission under the great seal, upon an appeal to the "king in the court of chancery in these causes. First, when a "sentence is given in any ecclesiastical cause by the archbishop or "his official; Secondly, when any sentence is given in any eccle-

* 4 Inst. 439. † Parl. Rot. 15 Edw. 3. N. 83. ‡ 25 Hen. 8. cap. 19.

"siastical cause in places exempt; Thirdly, when a sentence is "given in the admiralty court in suits civil and marine, by the order "of the civil law. And these commissioners are called delegates, "because they are delegated by the king's commission for these "purposes."

"Now because we have generally spoken of appeals in ecclesi-"astical causes, which are grounded upon acts of parliament, it "shall be pertinent to our purpose to set down the resolution of "the judges, and of the learned in the ecclesiastical law, which "doth sum up in what causes, from what courts, and in what "time appeals are to be made, and other necessary incidents con-"cerning the same, as the Lord *Dyer* under his own hand hath "reported, but are left out of the print, and yet worthy to be "known and published, which you shall hear in his own words "and language."

Lord Dyer's opinion upon appeals.

"First, In cases of testamentary and *tithes*, from the archdea-"con or his official, if the matter be there commenced, to the bi-"shop of the diocess, and from the bishop diocesan or his com-"missary in such case, or if the matter be there commenced with-"in fifteen days after sentence given, to the archbishop of the pro-"vince, and no further.

"Item, from the archdeacon or commissary of the archbishop, "if the matter be there commenced within fifteen days, &c. to "the audience or arches of the said archbishop: and from thence "within other fifteen days, &c. to the archbishop himself, and "no further. And if the case be commenced before the arch-"bishop, then to be there definitively determined without further "appeal.

"Item, where the matter toucheth the king, the appeal within "15 days to be made to the higher convocation house of that pro-"vince, and no further; but finally to be there determined.

"A general prohibition, that no appeals shall be pursued out of "the realm to Rome or elsewhere.

"Item, a general clause that all manner of appeals, what mat-"ter, manner, form, and condition within the realm, as it is above "ordered by 24 H. VIII. in the three causes aforesaid; and one "further degree in appeals for all manner of causes is given, viz. "from the archbishop's court to the king in his chancery, where "a commission shall be awarded for the determination of the said "appeal, and from thence no further."

"Item, that persons exempt shall likewise pursue their appeal "in the chancery *ut supra*, and not to the archbishop.

" Note, in case where a sentence is given by commissioners,
" delegates by the prince, as by the late visitors, An. 1. Eliz. the
" party grieved appealing, such appeal is out of the orders pre-
" scribed by the said statutes, and the prince in that case may
" grant a new commission to others to determine that appeal. *E*
" *ceo fait per l'opinion del plusors des justices en le case de Goodman*
" *deprive del Deanery de Wells.*

Deprivation of Bishop Gardiner.

Nota, *Stephen Gardener evesque de Winton, fuit deprive al Lam-*
" *beth per commission del Roy, Ed. VI. fait a* 10. *persons proceedin*
" *sur ceo, ex officio mero mixto judicii, vel promoto omni appellation*
" *remotâ summariè de plano, absque omni formâ et figurâ solâ fact*
" *veritate inspectâ.*

Coveney's appeal to the king in chancery.

" *Et vide Mich.* 3 *and* 4 *Eliz. Coveney president del novel colledg*
" *in Oxon deprive per le evesque de Winton, visitor del dit colledge*
" *et exempt de tout jurisdiction ordinary fait appeale al Roy in su*
" *chancery, et commission illonque grant a A. Browne et Westo*
" *justices, que sur conference ove auters justices et civilians, resolv*
" *que le appeale ne gist, ne ascun auter remedie pur le appellant po*
" *ceo que cesti case fuit hors del dit statute de* 24 *et* 25 *H. VIII. ca*
" *cest deprivation est mere temporal, et come per ley prov'. Ex qu*
" *sequitur, que une assise gist, &c.*"

" Nota, *in appellis per doctorem Lewes judic' admiral' et al' &c.*

Effects of an *Appellatione remotâ.*

" Forasmuch as an appeal is a natural defence, it cannot b
" taken away by any prince or power, and in every case generally
" when sentence is given, and appeal made to the superiour, th
" judge, that did give the sentence is bound to obey the appea
" and proceed no further until the superiour hath examined an
" determined the cause of appeal. Nevertheless, where this claus
" *(appellatione remotâ)* is in the commission, the judge that gav
" sentence is not bound to obey the appeal, but may execute h
" sentence and proceed further, until the appeal be received by th
" superiour, and an inhibition be sent unto him: for that clau
" (*appellatione remotâ,*) hath these notable effects. The first i
" that the jurisdiction of the judge that gave sentence, is not l
" the appeal suspended or stopped, for he may proceed the sam
" notwithstanding. The second, that for proceeding to executio
" or further process, he is not punishable. The third, that the
" things, that are done by the said judge after such appeal cann
" be said void, for they cannot be reversed *per viam nullitatis.*

Appeals to superiours are of right.

" But if the appeal be just and lawful, the superiour jud
" ought of right and equity to receive and admit the same, an
" ought to do justice to the subjects. And so if the cause of

"appeal be just and lawful, he ought to reverse and revoke all "mean acts done after the said appeal in prejudice of the appellant." Thus far the report of the Lord Dyer truly translated.

Commission of review after definitive sentence.

"Albeit the said acts of 24 H. VIII. and 25 H. VIII. do "upon certain appeals make the sentence definitive as to any ap- "peal, for the words be, (shall be definitive,) and that no further "appeal should be had; yet the king after such definitive sentence, "as supreme head, may grant a commission of review, *ad revi-* "*dendum*, &c. for two causes. 1. For that it is not restrained "by the statute. 2. For that after a definitive sentence, the pope "as supreme head of the common law, used to grant a commis- "sion *ad revidendum*, and such authority as the pope had, claiming "as supreme head, doth of right belong to the crown, and is an- "nexed thereunto by the statutes of 26 H. VIII. cap. 1. and 1 "Eliz. cap. 1: and so it was resolved in the King's Bench, Trin. "39 Eliz. where the case was, that sentence being given in an ec- "clesiastical cause in the country, the party grieved appealed ac- "cording to the said act of the 25 H. VIII. to the archbishop, "before whom the first sentence was affirmed*. Whereupon ac- "cording to the statute of 25 H. VIII. he appealed to the dele- "gates: before whom both the former sentences were repealed "and made void by definitive sentence, and thereupon the queen "as supreme head granted a commission of review, *ad reviden-* "*dum* the sentence of delegates. And upon this matter a prohi- "bition was prayed in the King's Bench, pretending, that the com- "mission of review was against law, for that the sentence before "the delegates was definitive by the statute of the 25 H. VIII. "But upon mature deliberation and debate the prohibition was "denied, for that the commission for the causes abovesaid, was "resolved to be lawfully granted. In this case I being then the "queen's attorney, was of counsel to maintain the queen's power. "And presidents were cited in this court, in *Micehelot's case* anno "29 Eliz. and in *Goadman's* case, and *Huets* case, in 29 Elizabeth "also. See the statute of 8 Eliz. c. 5: and observe like words in "that statute, *ut supra.*"

Review lay after definitive sentence of high commission.

"Upon a sentence given by the high commissioners, a com- "mission of review may be granted to, and for the party grieved, "as by an express clause within that commission appeareth. And "if no such clause had been therein, yet a commission of review

* Trin. 39 Eliz. in the King's Bench, *Hilliard's case*, Lib. Int. Bar. fol. 164 Appeal to Rome, ib. Rome, 389.

" might have been granted: *quia sicut fontes communicant aquas* " *fluminibus cumulativè, non privativè*; *sic rex subditis suis juris-* " *dictionem communicat in causis ecclesiasticis vigore statuti in hujus-* " *modi casu editi et provisi cumulativè, non privativè*, by construction " upon that act.

No appeal from the delegates.

In the year 1689, in the case of *Saul* v. *Wilson* *, before the Lords commissioners, *Maynard Keck and Rawlinson*; it was expressly said, that there lies no appeal from a sentence in the court of delegates; for they cannot have any original jurisdiction, because these matters are grounded upon acts of parliament, and the acts give none. In 1725, in *Franklin's case* † Lord Chancellor King held, that a commission of review to reverse a sentence given by the court of delegates was matter of discretion, and not of right, and if it were a hard case, (that case was to bastardize the issue of a second marriage, there having been none by the first pretended marriage,) the chancellor would advise the crown not to grant it ‡.

On a petition to the king in council, a commission of review may be granted under the great seal, appointing new judges, or adding more to the former judges to revise, review, and to hear the cause §; and in the commission of review, there is sometimes a clause, to admit other allegations, and new matter, and to take proofs thereupon as well on the one part as on the other.

Manner of obtaining a commission of delegates.

The manner of obtaining a commission of delegates is thus: the proctor of the appellant draws a petition to the lord chancellor or keeper, setting forth the cause, and what his client insists upon, and what the judge has decreed; and that thereupon his client thinking himself aggrieved, has appealed from the said decree to the King's Majesty in his high court of chancery: wherefore his client humbly requests of the Lord Chancellor, that a commission of appeal be made out and issued under the great seal, directed to certain judges, delegate to be named at his pleasure, to hear and determine the cause aforesaid. Whereupon the lord chancellor sets down the names of such persons as he thinks proper, and afterwards a commission is drawn and executed in due form, by virtue whereof the commissioners proceed to hear and determine the matter of the appeal.

Proceedings of inferior court suspended pending appeal to the delegates.

During the appeal, the sentence given by the inferior court or judge is suspended.

* 2 Vern 118. † 2 Pr. Wms. 299. ‡ 1 Ought. 437.
§ 1 Ought. 1b.

And pending the appeal, it is usual, at the instance of the appellant, for the superior court to grant an inhibition to stay the execution of the sentence in the inferior court, until the appeal shall be determined.

Inhibitions to be signed by an advocate.

By Can. 96. it is ordained, that no inhibition shall be granted out of any court belonging to the archbishop, at the instance of any party, unless it be subscribed by an advocate practising in the said court. And the like course shall be used, in granting forth any inhibition at the instance of any party, by the bishop or his chancellor against the archdeacon, or any other person exercising ecclesiastical jurisdiction. And if in the court or consistory of any bishop there be no advocate; then shall the subscription of a proctor practising in the same court, be holden sufficient.

And to be supported by affidavit and copy of the acts, of which the party complains.

And by Can. 97, it is further ordered and decreed, that henceforward no inhibition be granted by occasion of any interlocutory decree, or in any cause of correction, except under the form aforesaid. And moreover, that before the going out of any such inhibition, the appeal itself, or a copy thereof (avouched by oath to be just and true,) be exhibited to the judge or his lawful surrogate, whereby he may be lawfully informed both of the quality of the crime, and of the cause of the grievance, before the granting forth of the said inhibition. And every appellant or his lawful proctor, shall, before the obtaining of any such inhibition, shew and exhibit to the judge or his surrogate in writing, a true copy of those acts by which he complains himself to be aggrieved, and from which he appeals; or shall take a corporal oath, that he has performed his diligence and true endeavour for the obtaining of the same, and could not obtain it at the hands of the register of the court, or his deputy, tendering him his fee. And if any judge or register shall either procure or permit any inhibition to be sealed, so as is said, contrary to the form and limitation above specified; let him be suspended from the execution of his office, for the space of three months: and if any proctor, or other person whatever by his appointment, shall offend in any of the premises, either by making or sending out any inhibition, contrary to the tenor of the said premises; let him be removed from the exercise of his office, for the space of a whole year, without hope of release or restoring.

Penalty for granting inhibitions without these requisites.

Our spiritual courts bounden only by so much of the civil law as

It has been before remarked, that all the proceedings in the spiritual courts were regulated by the civil Roman (or Justinian's) code: yet as the sole authority, or force, which that law can have acquired in this country, must have been from the consent or acquiescence

they actually adopt.

of the community from time immemorial, (I exclude all statute provisos) it will evidently appear, that as much of that *law*, as has thus become a part of our common law, is to be ascertained from the actual practice of the particular court, which has adopted either the whole or a part of that code, and not from the code itself, so as to draw the spiritual court into or under a close or any obligatory conformity with the law, should the practice of the court deviate from the letter of that very Roman (or civil) law by which it professes to decide.

Of the proctors and advocates in the spiritual courts.

In the ecclesiastical courts, the parties to the suit are not denominated as they are in our courts. The party, which we call the plaintiff, is there called *actor*, from acting: and the defendant *reus* from being charged with delinquency or guilt. As in our courts of common law and equity, suits are managed and carried on by attornies and solicitors, so in the spiritual courts, they are managed and carried on by *proctors*, who are officers established to represent in judgment the parties, who empower them (the same is to be said of attornies) by warrant under their hands called a proxy, to appear for them, to explain their rights, to manage and conduct their cause, and to demand judgment *. The spiritual courts have also their *advocates*, who answer to what in the common law and equity are called counsel or barristers. And they are generally required to have taken the degree of a doctor of the civil law, before their admission †.

Citation.

The first step in the spiritual court, is the *citation;* which is a judicial act, whereby the defendant by authority of the judge, (the plaintiff requesting it,) is commanded to appear in order to enter into suit, at a certain day, in a place where justice is administered.

What it should contain.

The citation ought to contain, first, the name of the judge (and his commission, if he be delegated;) if an ordinary judge, with the stile of the court where he is judge; 2nd, the name of him, who is to be cited. 3rd. An appointed day and place, where he must appear; which day ought either to be expressed, particularly to be such a day of the week, or month, &c. or else only the next court day (or longer) from the date of the citation, in which the judge sits to administer justice: the time of appearance ought to

* Vid. 2 Burn, 237, who cites 1 Domat. 583. They are subject to many statute and canonical regulations as to their admission practice, &c. which it is not necessary for our purpose to specify.

† Their admission and practice are also subject to several statute and canonical regulations and conditions.

be more or less, according to the distance of the place where they live. 4th, The cause, for which the suit is to be commenced; 5th, the name of the party, at whose instance the citation is obtained *. A citation either contains a peremptory command to appear, or is *mandatory* and *inhibitory*, where the defendant is not only cited to appear, but the judge, before whom the cause lately depended is forbidden to proceed any further; or else they are intimatory, as where executors cite all the next of kin to see a will proved, &c. intimating, that if they do not appear, &c. the judge will proceed, &c. There are also general citations, as where the defendant is cited to attend the whole proceedings; or *special*, as where he is cited to do some particular act, &c. If the defendant abscond, so that the citation cannot personally be served upon him, a citation *viis et modis* goes out; a copy of which is to be affixed on the outward door of his house or last usual place of abode, or on the church door of the parish wherein he inhabits.

Mandatory and inhibitory.

General and special.

Citation *viis et modis.*

A great variety of ordinances and constitutions concerning citations are to be found in Linwood; which, for our purpose it would be useless to refer to. By the ancient laws of the church, the metropolitan was forbidden to exercise judicial authority in the diocess of a *comprovincial* bishop, unless in case of appeal or vacancy. And therefore when Archbishop Peckam excommunicated the Bishop of Hereford for resisting this concurrent power, and affirming against the archbishop, that he could not exercise any jurisdiction exclusive of the bishop within the bishop's own diocess, nor take cognizance of causes there *per querelam*; the archbishop defended his claim, not upon the common right of a metropolitan, but upon the peculiar privilege of the church of Canterbury, that the church of Canterbury enjoys such a privilege, that the archbishop for the time being may, and ought to hear causes arising within the dioceses of his suffragans, and that in the first instance, which privilege probably sprung from the archbishop of Canterbury being *legati nati* to the pope. But now this mischief is remedied by the act † 34 of H. VIII. c. 9. which reciting in the preamble, the great inconveniences of being cited to the arches and other high courts of the archbishop of this realm far from their own dioceses, &c. to answer causes and suits of defamation *with-*

Metropolitan's right to exercise judicial authority in any diocess of his province.

Remedied by statute forbidding citation out of the diocess (except in appeals.)

* It is not meant to enter into the *doctrina placitandi* in these courts, but merely to give a general idea of their process. Vide the form of a general citation, App. No. XLI.

† Vid. this act, App. No. XLII. It was repealed 1 and 2 Phil. and Mary, c. viii. And revived by 1 Eliz. c. 1.

holding of tithes, &c. enacted, that no person should be cited to appear out of his own diocess, except by appeal, &c.

Cases on citations out of the diocess.

Some few tithe cases have been decided on this statute. In the case of *Westcote* v. *Harding*, E. 15, Car. II *, when the suit was for tithes in the diocess of Sarum, where they lay, and prohibition was obtained upon this statute, because the defendant lived in London; the court, upon notice that the suit was for tithes, granted a consultation, and declared that that case was not within the statute: that the contrary seemed to have been agreed in the case of *Jones* v. *Boyer*, A. D. 1612 †. In *Woodward* v. *Makepeace* ‡; Woodward, who lived in the diocess of Litchfield and Coventry, but occupied lands in the diocess of Peterborough; was there taxed in respect of his land, as an inhabitant, towards a rate for new casting of the bells, and because he refused to pay, was cited into the court of the bishop of Peterborough, and libelled against for this matter. And by the court; this is not a citing out of the diocess, for he is an inhabitant, where he occupies the land, as well as where he personally resides §, M. 11. *Wm. Machin* v. *Molton*. In a declaration in attachment upon prohibition, the case was, that the plaintiff lived in Nottingham within the province of York, and there substracted tithes, and then removed into Lincolnshire, within the province of Canterbury. Afterwards he happened to go to York, and was sued there in the court of the Archbishop, for the substraction aforesaid, and had a prohibition on the statute for citing him out of his diocess. But at last, after debate, a consultation was awarded, for that substraction of tithes is local, and by the statute of the 32 H. VIII. c. 7. must be sued before the ordinary of that place, where the wrong was done; otherwise in cases transitory, where the action follows the person of the offender: and, as it was argued by the counsel, this is not citing out of his diocess within the statute; because the diocess, where he lives has not a jurisdiction, and if he might not be cited in this case, the thing would be remediless and dispunishable. So, if a peculiar be in two dioceses, and a man, who dwells in one of the dioceses in the peculiar, be cited to the court of the peculiar, holden in the other diocess, this is not a citing out of the diocess, because it is within the peculiar ‖.

Return of the citation.

The next step in the suit is the return of the citation ¶. Therefore the proctor of the plaintiff, on the day, on which the defendant

* Lev. 96. † 1 Lev. 96. 2 Brownl. 27. ‡ 1 Salk. 164.
§ B. E. L. 301, 4to edit. ‖ 2 Salk. 549. Lord Raym. 452, 534.
¶ Const. 34. Ought. 50, 51.

is summoned to appear, is to exhibit his proxy for his client, &c. and brings into court the original citation. Now this citation being a personal citation, (that is to say) such a one as could not be executed, unless upon the proper person of the defendant, and the party so to be cited, having perhaps absconded himself, that he cannot be met with; in this case the proctor ought to alledge it, and shew the mandatory's certificate pursuant to such his alledgment; and thereupon he ought to petition, that the defendant may be cited personally to appear (if he can, when so cited) to answer the contents of the former citation, and if not personally, then by any other ways and means, so as the *pars rea*, or party to be cited, may come to the knowledge thereof, and this is it, which is called *citatio viis et modis*, or *citatio publica*, a public citation, it is executed either by public edict, (a copy thereof being affixed to the doors of the house where the defendant dwells, or the doors of the church, within the parish which he inhabits) or by publication in the church, in the time of divine service; or per *campanam*, (the tolling of a bell) or *per tubam* or sounding of a trumpet, and *vexilli erectionem*, the erecting of a banner. This being done, a certificate must be made of the premises, and the citation brought into court, as is even now mentioned, and if the party cited appear not, the plaintiff's proctor must accuse his contumacy, he being first three times called by the cryer of the court, and in penalty of such his contumacy, he must request, that he may be excommunicated.

Nature of a *citatio viis et modis.*

These authentic certificates are now but seldom used, unless where the mandatory by reason of the distance cannot conveniently appear to make oath. Where the defendant appears not, the citation is returned in the following form:

Form of the return.

Jones v. *Johnson* } On which day Tubb returned the original
Tubb and Goff. } citation by him taken under seal in this behalf, together with a certificate of the due execution thereof, of the truth of which oath hath been made, (then a public proclamation being thrice made for the party cited) and he not appearing, the judge at the petition of Tubb accusing his contumacy, pronounced him in contempt, but reserved his pain, and continued the certificate of the said citation to the next court day. Goff appeared and exhibited his proxy for the party cited, and made himself a party for him, and prayed a libel to be given by Tubb, otherwise his client to be dismissed with expences; whereupon the judge assigned Tubb to libel on the next court day, the said Tubb dissenting.

Libel in the spiritual court. What?

The next general and most important step in these proceedings, is the *libel*, so called from the latin diminutive *libellus*, (a small book of paper.) It answers to the declaration in an action at law, and to the English bill in a court of Equity. The civilians* say, that a libel is nothing else, but a fit conception of words setting forth a specimen of the future suit, or is defined the lawyer's argument.

The parts of a libel.

It is said to consist of three parts, viz. 1. The major proposition; which shews a just cause of the petition. 2. The narration, or the minor proposition. Whereby is inferred (in the species of the fact propounded) that there is just cause for the petition. 3. The conclusion, or the conclusive petition, which conjoins both the propositions, and includes the minor in the major. A libel, therefore, is a practical and judicial syllogism. The conclusion consists in the petition, and not in the words related. And this is the chief part of the libel, which ought especially to be regarded. By this the plaintiff concludes, justly desiring from the premises, and the things propounded, that the defendant may be condemned, both in the principal and in the charges.

Properties of a libel.

† The properties of a libel; or those things, which are said to be particularly proper to a libel, are these, viz. that it be round, (as the civilians term it) dilucid, concluding, not obscure, uncertain, nor general, nor alternative.

The efficient cause of a libel, is the law, which deposeth a libel to be offered: but it commands principally, that it be offered to the judge, (seeing his office is implored upon this petition,) and then also to the adverse party.

Form of a libel.

The form of a libel, although it ought especially to be drawn, according to the stile and custom of every court, yet where there is no special custom extant, it ought to be drawn in writing; and in such manner, as that it may contain these five things, comprehended in these following verses:

Quis, quid, coram quo, quo jure petatur et à quo.
Rectè compositus quisque libellus habet ‡.

Intent of the libel.

The end of the libel is, that it may propound the plaintiff's desire, and instruct the judge and the adversary, as to the nature of the future suit, and be the foundation of judgment: for both

* Alciat. in prax. fol. 18, special de lib conf. sect. 1 Ummius disp. 6th. 8, 4, 3.

† Vid. Conset. 404.

‡ Hostiensis de Libell. oblat. Alciat. ubi sup. fol. 18, see form of a libel for tithes App. No. XLIII.

the articles of the proofs are to be accommodated to the form of the libel, and the sentence is to be pronounced according to the same. Wherefore to the intent, that the judgment be begun in due order, and be founded upon a certain thing, it is necessary, that a libel be given by the plaintiff, though not admonished thereto; the omission whereof doth vitiate the proceedings. Whence a libel is deservedly ranked amongst the substantial acts of the proceedings; for no libel existing, the proceedings are rendered null.

Appearance on the citation.

When the defendant appears upon the citation, then the libel ought to be exhibited by the plaintiff, and a copy of it delivered to him according to the provisions of the 2 Hen. V. c. 3*. This act was considered declaratory of the old, and not introductory of a new law †. A prohibition lies for denying a copy of the libel, to any ecclesiastical court; for the ecclesiastical jurisdiction is limited, and the party ought to know, whether the matter be within their jurisdiction, and how to answer. After a copy is given, the prohibition, *ipso facto*, is discharged without any writ of consultation issued. And if a copy of the libel be not delivered, there is a writ in the register to compel the delivery of it ‡.

Prohibition will issue until the spiritual court grant a copy of the libel.

Fitzherbert says, if a man be sued in the spiritual court, and the judges there will not grant unto the defendant a copy of the libel, then shall he have a prohibition directed unto them for to surcease, until they have delivered the copy of the libel. Which prohibition the more modern books have put under these two limitations; first, that before it is granted, an oath be required, of the denial of the libel; and secondly, that it shall not be granted at all, if the appeal be made for such denial, (as for a gravamen) from an inferior to a superior court, because the party has his election, and has chosen another remedy.

Action lies also for refusal of a copy of the libel.

To the remedy by way of prohibition, Fitzherbert adds, that the defendant may have an action against them upon this statute, if they will not deliver the copy of the libel, whether the cause in the libel be a spiritual cause or not.

When the actor (or plaintiff) gives in his libel, it is done in the following form, viz.,

Form of giving in a libel.

H. *against* H. } C. is to give a libel this day, on which day C.
C. S. } gave in a libel in writing, which he prayed to be admitted, and an answer to be given thereto immediately by S. in the presence of S. dissenting thereto, and alledging, that the said

* Which see App. No. XLIV. † Gibs, 1010. 2 Salk. 553. Barn. 1603.
‡ For which see App. No. XLV.

libel was not concludent in law, and therefore not admissible by law, and praying the same to be rejected. Whereupon the judge at the petition of C. admitted the said libel, and assigned S. to answer thereto immediately, S. dissenting; but with intention of answering the same contested suit negatively thereto, then prayed; and the judge at his petition assigned C. to prove his libel by the next court day, the said C. dissenting.

Answer to the libel.

The regular progress of the cause brings us to the defendant's answer. It will be obvious, that many irregularities in the parties litigant may create the necessity of pleading and acting specially, which it is not the object of this work to go into. If the suit proceed regularly after contestation of suit, and the oath of *calumny** taken by both the litigants, the next thing which follows in course

Oath of calumny.

* The oath of calumny is defined to be that, whereby the parties in suit do protest their conscience in the prosecution of the cause, (*Scil.*) that they do it not out of fraud or vexation, &c. but out of a confidence they have of the justness of their cause. And of this oath of calumny, there are two sorts, (*Scil.*) the one general, (which is not taken oftener than once in the cause, and that immediately after the suit is contested, or, if omitted then, in any part of the proceedings afterwards:) the other special, which is likewise called the oath of *malice*, and may be administered to either of the parties, as often as the judge sees fit in any part of the proceedings either before or after the suit is contested, and whether the general oath be taken or not.

These oaths are to be administered not only to one, but to both or either of the parties. And these oaths Mynsinger proves (from Cicero, his oration *pro Roscio*) were usually administered to the parties, before Justinian's time. There is only this difference betwixt them, that the one may be administered at any time, when there is occasion, the other only once. As to their form, authors prescribe one and the same in effect for both parties. The general oath of calumny is usually administered in this or the like form, (*Scil.*)

"You shall swear that you believe the cause you move is just; that you will not deny "any thing you believe is truth, when you are asked of it; that you will not (to your "knowledge) use any false proof; that you will not out of fraud request any delay in as "to protract the suit. That you have not given or promised any thing, neither will give "or promise any thing, in order to obtain the victory, except to such persons, to whom "the laws and the canons do permit. *So help*, &c.

If the plaintiff refuse this oath of calumny, &c. he is to desist from further prosecution of his action. If the defendant refuse it, then he is to be condemned, as one confessing the articles laid against him. The substance of this oath of calumny has been expressed in the following monkish rhymes:

Illud juretur, quod lis tibi justa videtur,
Et si, quæretur verum non inficietur.
Nil promittetur; nec falsa probatio detur:
Ut lis tardetur, dilatio nulla petetur.

There was also formerly in use in these courts, a voluntary or decisive oath given by one party to the other, when one of the parties litigant being unable to prove his charge offers to stand or fall by the oath of his adversary; not unlike the wager of law with us, where the common law allows a man in an action of debt upon simple contract, to free himself upon his own oath. 1 Inst. 155. 2 Inst. 45. But Oughton says, this oath has been long obsolete, 176.

of practice, is the demanding and giving in of personal answers, which are made in writing, to the several articles or positions of a libel, or to any other judicial matter exhibited in court.

These answers ought to be made, in very clear and certain terms; and in civil suits upon the oath of the person, that exhibits them.

Answers must be sufficient.

For the personal answers are therefore provided in law, that by the help of them, the adverse party may be relieved in the matter of proof. And if these answers be not clear, full, and certain; they are deemed and taken in law as not given at all; and upon a motion made, the judge ought, by an interlocution, to enjoin new answers; it being the same thing to give no answer at all, as to give a general and insufficient answer.

A personal answer, therefore, ought to have these three qualities in it. First it ought to be pertinent to the matter in hand. Secondly, it ought to be absolute and unconditional. And, thirdly, it ought to be clear and certain.

Letters compulsory and term probatory.

The defendant's refusal to make any answer, or his making a short unsatisfactory or evasive answer may give rise to a variety of process before the cause goes to commission. When satisfaction has been made as to the answer of the defendant, letters compulsory are to be obtained to compel witnesses to submit to an examination either before the judge himself, or before the commissioners appointed by him for that purpose, within the *term probatory*; which is a term in the civil law importing that space or period of time assigned for proof, or given to the suitors to prove their allegations in, *datur autem unus et idem terminus actori, et reo.*

Taking depositions in spiritual court, like taking them in our courts of equity.

The whole system of taking examinations and depositions, either before the regular examiners of the court at home or commissioners at a distance, in the spiritual courts, and of passing publication, nearly resembles that which prevails in our courts of equity, viz. the Chancery and the Exchequer*.

Sentences either definitive or interlocutory.

In these courts the suit is terminated by the sentence, which is either definitive, or interlocutory:

A definitive sentence is that, which puts an end to the suit in controversy, and regards the principal matter in question.

An interlocutory sentence determines only some incident or emergent matter in the proceedings, as some exception, or the like; but does not determinately affect the principle in controversy.

* If any practitioner wish to see the forms of the courts, and the acts, by which the whole matter of evidence is regulated under various circumstances, they are to be seen Appendix No. XLVI.

No sentence of excommunication without admonition.

By the ancient canon law, sentence of suspension, or excommunication, ought not to be given without a previous admonition; unless the offence were such as in its own nature immediately required such sentence.

Sentence must be in writing, or it cannot be appealed from.

Every sentence must be in writing; otherwise it deserves not the name of a sentence, and needs not the formality of an appeal to reverse it*.

By cxxiii canon, no judicial act to be speeded without the register of the court, or his deputy.

Having spoken generally of appeals from the inferior to the higher spiritual courts, we shall proceed without harassing the reader with the special process or forms of appealing, to other more immediate objects of our intended investigation. It will not, however, be irrelevant to the subject in hand, to notice that by the cxxiii of the canons of 1603†, it was provided "That no chancellor, commissary, archdeacon, official, or any other person using ecclesiastial jurisdiction, whosoever shall speed any judicial act, either of contentious or *voluntary jurisdiction*, except he have the ordinary register of that court, or his lawful deputy; or if he will not or cannot be present, then such persons, as by law are allowed in that behalf to write or speed the same, under pain of suspension *ipso facto*."

Effect of the term *voluntary* jurisdiction.

This canon is not only noticed for the purpose of proving that notoriety and certainty, which the usages and forms of the spiritual courts require; but more especially for arresting the reader's attention to the formal recognition thereby made by the whole body of the clergy convened on the occasion of framing these canons, that the contentious jurisdiction of the spiritual courts is distinct from that original, pure, spiritual jurisdiction of the Christian bishop, which being out of the competency, controul, and coercion of the civil power, is thereby distinguished from it by the epithet *voluntary*, in as much as the adoption of, and submission to the revealed religion of Christ is voluntary, and can be imposed upon no one by the force of the arm of the civil power.

The rivalry of the spiritual and temporal courts the source of prohibitions.

Almost as soon as the spiritual or ecclesiastial courts were separated from the sheriff's courts, and became governed by a spiritual law of their own, differing essentially from the law of the land, by which, whilst the causes of spiritual forensic cognizance were adjudged in the sheriff's court, they had been determined, it

* For the acts of the courts for passing sentence, and protesting against, and appealing from sentences of inferior to superior courts. Vid. App. No. XLVII.

† It was observed before, p. 137, that in as far as they are new, they bind the clergy though not the laity.

naturally followed, that the objects of the jurisdiction of these courts were more scrupulously and punctiliously discriminated from those, which remained cognizable by the temporal courts. As the courts themselves were called *spiritual*, so did all causes coming before them receive the like denomination. Tithe causes were therefore considered to be exclusively of spiritual cognizance. Early jealousies existed between the temporal and spiritual courts. When once the latter became purely forensic and separate, their powers were more narrowly watched by the temporal courts, and they in their turn became open to all the effects of that predominant influence, which the monopoly of learning and the consequent superiority of the clergy over the laity had almost secured by prescription. There existed at all times an innate affection in Englishmen, for their laws and liberties. Hence the sturdy and admirable answer of our old barons to the clergy, *nolumus leges Angliæ mutari*. And hence the many applications to, and provisions by the legislature touching these matters of ecclesiastical forensic cognizance. Out of the reciprocal tenacity of the *civil* and *spiritual* judicatures, arose the perpetual conflict and warfare of those rival powers*, which established the system of prohibitions, that are the foundation of all the legal determinations upon the extent and effects of ecclesiastial sentences and judgments.

Prohibition. What?

The laity was jealous of, and felt aggrieved by being drawn into the spiritual courts, and the clergy assumed the privilege of being exempted from the jurisdiction of the temporal courts, or the *forum seculare*. The common law remedy for the grievance of being called before an incompetent jurisdiction *coram non judice*, is the writ of *prohibition*; which being the king's prerogative writ is properly issuing out of the court of King's Bench†, but for the furtherance of justice it may now also be had in some cases out of the court of Chancery, Common Pleas, or Exchequer, directed to the judge and parties of a suit in any inferior court, command-

* Thus speaks J. Blackstone upon this point, 1 B. Com. 113. So long as the idea continued among the clergy, that the ecclesiastical state was wholly independent of the civil, great struggles were constantly maintained between the temporal courts and the spiritual, concerning the writ of prohibition and the proper objects of it; even from the time of the constitutions of Clarendon, made in opposition to the claims of archbishop Becket, in 10 Hen. II. to the exhibition of certain articles of complaint to the king, by archbishop Bancroft, in 3 Ja. I. on behalf of the ecclesiastical courts; from which, and from the answers to them, signed by all the judges of Westminster Hall, (before alluded to, p. 143) much may be collected concerning the reasons of granting, and methods of proceeding upon prohibition.

† 3 Bl. Com. 112.

ing them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. This writ may issue, and may be directed to the courts Christian, where they concern themselves with any matters not within their jurisdiction; as if they should attempt to try the validity of a custom pleaded, &c. Or if in handling of matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws of England; as where they require two witnesses to prove the release of tithes, or the like; in such cases also a prohibition will be awarded. For, as the fact of actual payment is not properly a spiritual question, but only allowed to be decided in those courts, because incident or accessary to some original question, clearly within their jurisdiction; it ought therefore, where the two laws differ, to be decided not according to the spiritual, but the temporal law; else the question might be determined different ways, according to the court, in which the suit is depending; an impropriety, which no wise government can or ought to endure, and which is therefore a ground of prohibition. And, if either the judge or the party shall proceed after such prohibition, an attachment may be had against them, to punish them for the contempt, at the discretion of the court that awarded it; and an action will lie against them, to repair the party injured in damages.

Process in prohibition.

The process in prohibition * is, that the party aggrieved in the court below, (i. e. in the spiritual court) applies to the superior court setting forth in a suggestion upon record, the nature and cause of his complaint, in being drawn *ad aliud examen*, by a jurisdiction or manner of process disallowed by the laws of the kingdom: upon which, if the matter alledged appear to the court to be sufficient, the writ of prohibition immediately issues; commanding the judge not to hold, and the party not to prosecute the plea. But sometimes the point may be too nice and doubtful to be decided merely upon a motion: and then, for the more solemn determination of the question, the party applying for the prohibition is directed by the court to declare in prohibition; that is, to prosecute an action, by filing a declaration against the other, upon a supposition, or fiction, that he has proceeded in the suit below, notwithstanding the writ of prohibition. And if, upon demurrer and argument, the court shall finally be of opinion, that the matter

* For the form of a writ of prohibition, vide App. No. XLVIII.

suggested is a good and sufficient ground of prohibition in point of law, then judgment with nominal damages shall be given for the party complaining, and the defendant, and also the inferior court, shall be prohibited from proceeding any further. On the other hand, if the superior court shall think it no competent ground for restraining the inferior jurisdiction, then judgment shall be given against him, who applied for the prohibition in the court above, and a writ of *consultation* shall be awarded. This writ is so called, because upon deliberation and consultation had, the judges find the prohibition to be ill founded, and therefore by this writ they return the cause to its original jurisdiction, to be there determined in the inferior court. And, even in ordinary cases, the writ of prohibition is not absolutely final and conclusive. For, though the ground be a proper one in point of law, for granting the prohibition, yet, if the fact, that gave rise to it be afterwards falsified, the cause shall be remanded to the prior jurisdiction. If, for instance, a custom be pleaded in the spiritual court; a prohibition ought to go, because that court has no authority to try it; but if the fact of such a custom be brought to a competent trial, and be there found false, a writ * of consultation will be granted. For this purpose the party prohibited may appear to the prohibition, and take a declaration, (which must always pursue the suggestion) and so plead to issue upon it; denying the contempt, and traversing the custom, upon which the prohibition was grounded: and if that issue be found for the defendant, he shall then have a writ of consultation. The writ of consultation may also be, and is frequently, granted by the court without any action brought; when, after a prohibition issued, upon more mature consideration, the court are of opinion that the matter suggested is not a good and sufficient ground to stop the proceedings below. Thus careful has the law been, in compelling the inferior courts to do ample and speedy justice; in preventing them from transgressing their due bounds; and in allowing them the undisturbed cognizance of such causes, as by right, founded on the usage of the kingdom, or act of parliament, do properly belong to their jurisdiction.

Writ of consultation.

The 14th clause of the 2d and 3d of Edw. VI.† shews very explicitly what is the present law touching the process in prohibition. "Be it further enacted by the authority aforesaid, that if any party "at any time hereafter, for any matter or cause before rehearsed,

Prohibitions and consultations regulated by 2 and 3 Edw. VI.

* For more on the learning of the writ and process of consultation, vide the case of *Soby* v. *Malins*, Plow. 470, and form of the writ in the App. No. XLIX.

† See the act in the App. No. VI.

" limited or appointed by this act, to be sued or determined in the " king's ecclesiastical court, or before the ecclesiastical judge, do " sue for any prohibition in any of the king's courts where prohi- " bitions before this time have been used to be granted, that then " in every such case the same party, before any prohibition shall " be granted to him or them, shall bring and deliver to the hands " of some of the justices, or judge of the same court where such " party demanded prohibition, the very true copy of the libel de- " pending in the ecclesiastical court, concerning the matter where- " fore the party demandeth prohibition, subscribed or marked with " the hand of the same party; and under the copy of the said " libel shall be written the suggestion wherefore the party so de- " mandeth the said prohibition: and in case the said suggestion " by two honest and sufficient witnesses at the least, be not proved " true in the court, where the said prohibition shall be granted " within six months next following, after the said prohibition " shall be so granted and awarded, that then the party that is letted " or hindered of his or their suit in the ecclesiastical court, by such " prohibition, shall, upon his or their request, and suit without " delay, have a consultation granted in the same case in the court, " where the said prohibition was granted, and shall also recover " double cost and damages against the party that so pursued the " said prohibition, the said costs and damages to be assigned or " assessed by the court, where the said consultation shall be so " granted; for which costs and damages, the party, to whom they " shall be awarded may have an action of debt by bill, plaint or " information, in any of the king's courts of record, wherein the " defendant shall not wage his or their law, nor have any essoin or " protection allowed or admitted."

Ancient statute proofs of the dependance of the ecclesiastical forensic courts upon the civil power.

The before mentioned * statute of *circumspectè agatis*, was a very important legislative declaration of what objects were matters of the spiritual forensic cognizance. Amongst several therein recited, for meddling with which the temporal judges were warned not to harass the ecclesiastical judges, we read. " Item, if a " parson demand of the parishioners oblations or tithes due and ac- " customed; or if any parson do sue against another parson for " tithes greater or smaller, so that the fourth part of the value of " the benefice be not demanded. Item, if a prelate of a church or " a patron demand of a parson a pension due to him, all such de- " mands are to be sued in a spiritual court." Were any thing still

* Vid. antea p. 140.

wanting to prove that the whole of the *civil establishment* of religion proceeds from the state, these express provisions by the civil magistrate to regulate, stint and controul the powers of the courts christian, are irrefragably conclusive. For even so early as the year 1285, in which that statute was passed, our legislature considered the spiritual courts so dependent, so defective, or so incompetent to do complete justice to the subject, that even between two ecclesiastical persons, who in the spirit of those days disclaimed any submission or liability to the temporal courts, until they were by their own courts sentenced to be delivered over to the lay power, *brachio seculari*, the spiritual courts were not permitted to enter upon any cause touching tithes or ecclesiastical benefices, if the object of the suit extended beyond a fourth part of the value of the living, i. e. whether it consisted of tithes, glebe, or other emolument, so that to this day, in any such case, the right of tithes is to be tried at common law *. And as to the pensions here spoken of by the statute, which in the modern acceptation of the term, extend to many other than pensions arising out of tithes or other church livings, Lord Coke speaks very explicitly †. "This "act giveth conusans of suit for a pension, when a prelate or a "prior, demand a pension of a parson of a church. But this must "be intended of a pension, which had his essence by some ordi- "nance made by the ordinary upon a controversy for tithes, or the "like, by which ordinance the tithes are to be enjoyed by the one, "and he is to pay a pension for the same to the other: for this "pension, because it beginneth by an ecclesiastical act, and by an "ecclesiastical judge, he may take his remedy by force of this act "in the ecclesiastical court; but if a pension be claimed by pre- "scription, there, seeing a writ of annuity doth lye, and that pre- "scriptions must be tried by the common law, because the com- "mon and the canon law do therein differ, they cannot sue for "such pension in the ecclesiastical court, no more than if a pen- "sion be granted by deed by a parson, with the consent of the "prior and ordinary.

What are the pensions mentioned in the statute *circumspectè agatis*.

"A writ of annuity must be brought therefore at the common "law: and all this doth notably appear by a judgment in the next "year after the making of this statute, where the case was, that "the abbot and convent of Leicester did by their deed under con- "vent seal, bearing date anno 25, H. III. grant to the abbot of "Saint Ebrulfe and his successors a yearly rent or annuity, for

Case of the abbot of Leicester, 25 Hen. III.

* 2 Inst 491. † Ibid.

" certain tithes granted by the abbot and convent of Saint Ebrulfe, " to the abbot of Leicester and his successors; for which annuity " or yearly rent (being granted out of the lands) the abbot of Saint " Ebrulfe, brought a writ of annuity against the abbot of Leicester: " wherein the judgment was. *Et quia cognitio placiti petendi an-* " *nuum redditum directè secundum consuetudinem regni spectat ad* " *curiam domini regis, et in eâ debet hujusmodi placitari, et præ-* " *dictus abbas de Sancto Ebrulf. petit quendam annual' redd' sibi de-* " *bitum per præd' contractum in præd' scriptis contentum inter præ-* " *decessorem suum et prædict. præd Abbatis Leicest', et non aliques* " *decimas. Considerat' est, quod præd' abbas de sanct. Ebr' recu-* " *peret de cætero præd' annuum redditum versus præd'. Abbat de* " *Leic', et similiter arreragia sua de tempore istius abbatis de sanct.* " *Ebr' quæ taxantur justie' ad xllx. et abbas de Leicest' in miseri-* " *cordia, &c. postea venit prædict. Abbas de Leicest' et satisfecit* " *præd' abbati de sancto Ebr' de lxl. ad tres vices, et etiam de aliis* " *arreragiis præd' redditus usq; ad hunc diem a tempore impetrationis* " *brevis, de tempore præd' abbatis de sancto Ebrulpho, &c.* And " upon this diversity this statute is well explained, and our books " reconciled."

Jurisdiction of spiritual courts established by 18 Edw. III. saving the king's rights.

Very early after the separation of the spiritual courts from those of the sheriffs, and the establishment of exclusive spiritual judicatures, certain matters were ascertained, which were called the churches rights, within the separate jurisdiction of the spiritual forensic courts: so that it became a settled point, that the ecclesiastical courts had the sole power to hold plea of the substraction, or withholding of tithes (except in the king's case,) and this claim is recognized and supported by divers cases in law, and some acts of parliament, but still with some restriction, as has been before observed: yet was not this claim of the clergy submitted to without great reluctance from the laity, as appears by the statute 18 E. III. c. 7 *. which we mentioned before, p. 144, and which contains a saving to the king in the following words, that is to say, *saving to us our rights, such as we and our ancestors have had, and were wont to have of reason.* It has been fashionable with some anti clerical writers, to question the validity of this statute by charging the clergy with having procured the royal assent without the concurence of the commons. Fitzherbert †, however, and our other legal writers of the first authority entertain no such doubt, but speak of it as of a real and valid statute.

Writ of *indicavit.*

When a parson sues in the spiritual court for tithes, which do

* Vid. antea, p. 144, and Appendix No. IX.

† Fitz. N. B. p. 30.

amount unto the fourth part of the advowson, against the parson of another parish; then that parson, who is sued in the spiritual court may purchase a writ, which is called *indicavit*, which writ is a prohibition, and shall be directed as well unto the judge of the court as unto the party, that they do not proceed in the plea, &c. And then the patron of that parson, who is so prohibited by the *indicavit*, may have and sue a writ of right of advowson of dismes, and the form of the writ is such:

Form thereof.

Command A. that he render to B. the advowson of the tithes of one third part of the church of T. or of one fourth part or moiety of the church, &c.

And this writ is founded upon the statute of West 2. c. 5. in the end of the statute, and doth not lie of a less part of the tithes, than of the fourth part of the church. But it seems, that at the common law, before the statute, a writ of *droit des dismes* lay and was maintainable; as, *command, &c. that he render, &c. the advowson of the tithes of one fifth part, or one sixth part of the church, &c.* and that by the statute of 18 Ed. III. which is then recited *verbatim*.

The right of tithes formerly cognisable by the temporal courts.

Hence it appears, that before that statute, the right of tithes was determined in the king's temporal court; but that statute altered the law. It is to be collected from the different parliamentary provisions, as well as from our old books, that the clergy not only once claimed an exclusive right of determining certain questions, but also of excluding the laity from any benefit of their decisions. Wherever then the right of tithes was in question between two laymen, or between a clergyman and a layman, there the king's temporal courts had cognizance thereof *.

Spiritual court has only jurisdiction between two clergymen.

And so if the question were between the farmer, baily, or servant of one clergyman, and the farmer, baily, or servant of another, or the other clergyman himself; there, though the dispute appeared in these cases to be concerning the right of tithes between the two parsons, yet the king's temporal court should not be ousted of its jurisdiction, for as much as it appeared both parties were not clergymen; but where the contest was directly between two clergymen, there the jurisdiction of the spiritual court seemed to have been as constantly admitted †.

Spiritual court for a time as-

The old general, though narrow rule of law was, that the substraction or withholding of tithes was cognizable in the spiritual

* *Vide* 38 E. 3, 36. 39 E. 3, 23. 44 E. 3, 29. 2 H. 4, 15. 1 H. 6. 5 H. 6, 10. 20 H. 6, 17. 31 H. 6, 11. 2 E. 4, 5. 44 Ass. 25, &c.

† See 14 H. 4, 17. 5 H. 5, 40. 38 H. 6, 21.

sumed a right to determine all matters incidental to the payment of tithes.

courts: and for a time they assumed therefore a right of adjudging all matters incidental to the payment of tithes *.

An old case from the year books proving that the right of tithes is cognisable only by court Christian.

That the right of tithes belonged merely to the court christian, was acknowledged by the common law judges, as early as the year 1453 †. A writ of trespass was brought against one by a parson, for taking and carrying away his corn in the sheaves lying in a certain place. The defendant justified, as servant to another parson, the taking them as tithes within his parish, which were severed from the nine parts, and gave colour to the plaintiff. The plaintiff shewed, that he was parson of a church adjoining to the other parish, and that he had a portion of tithes in that place, and was possessed of them, and made a sufficient title as parson. And inasmuch as the defendant had acknowledged the trespass, he prayed his damages.

Hingeston. Upon his own shewing we pray that the court be ousted of jurisdiction.

Laicom. And we pray our damages for want of an answer; for we cannot sue the servant in court christian, because he is a lay person, any more than we can sue the farmer of a church; and therefore the court shall have jurisdiction.

Fortescue. It appears to the court, that the right of tithes is in question, and that all, which the servant did was in his master's right; and if issue should be taken in this court, the servant would have aid of his master. Parsons cannot gather their tithes themselves, and must therefore of necessity employ servants; and as it

* Prynne's King John, p. 126, in a fragment of plea-rolls in the tower, before the justices itinerant, about the 55th year of Henry III. (as Mr. Prynne conjectures by the hand,) and A. D. 1274.

Master William de Brauncewell was attached at the suit of Gilbert Parleben, wherefore he drew him into plea in the spiritual court about the charters of the said Gilbert, which concern neither testament nor matrimony. And Henry, dean of la Ferd, was attached to answer the said Gilbert, wherefore he held the said plea.

And William and the dean come and say, that after the prohibition of the lord the king, they never held nor prosecuted the said plea; but they will speak the truth, that in fact, the said Gilbert sold to the said William, and to a certain person his partner, the tithes of the corn of his church for 37 marks; and because he had not paid that money at the appointed times, he, as parson, impleaded him in the chapter before the prohibition, and he demands judgment if he could do that or not.

And Gilbert comes and acknowledges the whole, but saith, that he paid the said money to him, but he hath no suit thereof: and he saith, that the said William demands of him a certain penalty.

And William saith, that he neither doth nor will demand of him any penalty.

It is therefore considered, that the said William may lawfully prosecute the said plea in the spiritual court, since it is concerning tithes, and that the said dean may hold plea thereof. And Gilbert *in mercy*, &c.

† 31 Hen. VI. 11. a pl. 7.

appears, that what the servant did in this case was in the right of his master, the right of tithes, which belongs merely to court christian would be determined in this court, if we were to proceed. Therefore by the award of this court upon your own shewing, sue in court christian. By such plea, when the question clearly is of spiritual cognizance, the temporal court is ousted of jurisdiction.

Spiritual court cannot determine whether tithes be due and accustomed or not.

A nice distinction is however to be taken upon the right of tithes being cognizable in the spiritual court, for the ecclesiastical courts have no jurisdiction to try the right of tithes, unless between spiritual* persons; as in ordinary cases, between spiritual men and laymen, they can only compel the payment of them, when the right is not disputed; by the statute of *circumspecte* †*agatis*, it is declared, that the court christian shall not be prohibited from holding plea, "*si rector petat versus parochianos et decimas debitas* "*et consuetas*," that is, due and accustomed tithes: so that if any dispute arise, whether such tithes be due and accustomed, this cannot be determined in the ecclesiastical courts, but before the king's court of common law ‡, as such question affects the temporal inheritance, and the determination must bind the real property; but where the right does not come in question, but only the fact, whether or no the tithes allowed to be due be really subtracted or withdrawn, this is a transient personal injury, for which the remedy may properly be had in the spiritual court, viz. the recovery of the tithes, or an equivalent.

Indicavit will issue wherever spiritual court intermeddles with collateral matter.

It may indeed be generally admitted, that wherever any collateral or consequent temporal matter arises out of the question or cause, which was originally of spiritual cognizance, there the spiritual court is ousted of jurisdiction, by prohibition or writ of *indicavit*; which is the usual process, by which a party is called into the spiritual court upon any matter, over which that court has not full jurisdiction. This being the process of a temporal court of common law, ought properly to be considered in a subsequent chapter. For the purpose, however, of giving to the reader more explicit ideas of the relative effects of one court upon the other in this contest or competition for legal and competent jurisdiction, I

* Where the dispute is between rector and vicar, being both spiritual persons, it seems that the proper cognizance of the cause belongs to the ecclesiastical judge. I. B. E. L. 75.

† Stat. 13 Edw. I. c. 4, or rather 9 Edw. II. 3 Black. Com. 88, n. see Rayn. Pref. to Reed on Stat. Geo. II. p. xii.

‡ It is said, that all compositions for the endowments of vicarages shall be expounded by the judges of the common law; and if the spiritual courts meddle with that matter, they are to be prohibited. Watts. chap. 89.

shall by anticipation now refer him to forms of pleading in prohibition *, observing for the satisfaction of such readers, as are not of the profession that, the writ of *indicavit*, is a prohibition directed both to the judge and the party to surcease proceeding in the spiritual court †. It ought to be sued before judgment given in the spiritual court, for after judgment given there, the *indicavit* is void.

Effects of a consultation.

Consultation is a writ, whereby a cause being formerly removed by prohibition out of the ecclesiastical court, or court christian, to the king's court, is returned thither again. For if the judges of the king's court, comparing the libel with the suggestion of the party, find the suggestion false, or not proved, and therefore the cause to be wrongfully called from the court christian, then upon this consultation or deliberation, they decree it to be returned again; whereupon the writ in this case obtained is called a consultation. Concerning which it is enacted by the statute intitled, "*The statute of consultation*," made in the 24 Ed. I. A. D. 1296, as follows:

Statute of consultation.

"Whereas ecclesiastical judges have often surceased to proceed in "causes moved before them, by force of the king's writ of prohi- "bition, in cases, where remedy could not be given to complain- "ants in the king's court, by any writ out of chancery, because "that such plaintiffs were deferred of their right and remedy in "both courts, as well temporal as spiritual, to their great damage, "like as the king hath been advertised by the grievous complaint "of his subjects; our lord the king willeth and commandeth, that "where ecclesiastical judges do surcease in the aforesaid cases, by "the king's prohibition directed unto them, that the Chancellor "or the Chief Justice of our Lord the King for the time being, "upon sight of the libel of the same matter, at the instance of the "plaintiff, (if they see that the case cannot be redressed by any "writ out of the chancery, but that the spiritual court ought to "determine the matters,) shall write to the ecclesiastical judges, "before whom the cause was first moved, that they proceed "therein, notwithstanding the king's prohibition directed to them "before."

* Vide the pleadings in *Foster and another* v. *Hall*, Hil. 7 Wm. III. Rot. 128. Lil. Ent. App. No. L.

† Fitzh. N. B. 33 and 45. Who there gives the following form of the writ: "The "king to the official of the bishop, &c. and to his commissaries, greeting: Whereas A. "of B. parson of the church of W. holds all the tithes forth-coming of the marsh, &c. "of our advowson, the abbot of Battel claiming them to belong to his church of, &c. "draws him into plea, &c. We prohibit you, &c. whether the advowson of the same "tithes belongs to us, or to the aforesaid abbot, because pleas, &c.

Remedies in the spiritual courts.

As prohibition goes only in those instances, in which the spiritual court has not jurisdiction, the order we have carved out obviously leads us to reserve the consideration of these cases for the next chapter, as prohibition is a common law process. At present, therefore, we proceed to consider the cases, in which the spiritual courts may administer justice to parties aggrieved. Suitors in the spiritual courts have their remedy either by appeal, when the matter is of ecclesiastical cognizance, or by prohibition, when it is not. Of appeals we have spoken generally before*. The two general cases, in which prohibition shall go, are 1°. when the spiritual court holds plea of that which appertains to the common law: for where the common law, which has the prerogative, may intermeddle, there the spiritual law cannot interfere; otherwise there might be two supreme jurisdictions acting in collision and contradiction to each other. 2°. Where it is not competent for the spiritual court to do right and justice to the parties. In all other cases, prohibitions ought not to be granted†.

Two general grounds of prohibition.

Prohibition will be granted wherever remedy lies at common law.

‡ If a man sue in the spiritual court for rent reserved on a lease of tithes, a prohibition lies; for an action of debt may be brought for this at common law. And § if I owe one 10*l.* and swear to pay him by a certain day, and upon that he sues me in the spiritual court *pro læsione fidei*, a prohibition lies; for he may have an action of debt against me for this at common law. So in *Pierce Peckham's* case ‖, if a man sue one in the spiritual court for a spiritual cause, and they refuse to deliver the libel to the party, according to the statute of 4 H. 7. c. 3., by all the judges, a prohibition is to be granted; for the non-delivery of the libel is a tort, which tort is a matter temporal, and punishable by the temporal law; so that in these cases a prohibition is grantable.

Present and lasting good understanding of the two courts.

The line of demarcation between the respective jurisdictions of the ecclesiastical and temporal courts, has been long so firmly settled, that no collision of the two powers has been lately felt. In that notable contest between the spiritual and temporal judges under James the 1st, alluded to (p. 142.) all objections were taken to the process of prohibition by the ecclesiastical judges, which ingenuity and argument could suggest: and the answers of the common law judges displayed that open fairness and resolution, which are characteristic of English jurisprudence. So much

* Vide p. 235.

† 1 Gwil. 169, from Turnor's MS. and very full note of the Bishop of Winchester's case, A. D. 1596, which is more shortly reported by Lord Coke, 2 Rep. 43.

‡ 44 Edw. III. 32. § 22 Edw. IV. 20. b. ‖ 4 Hen. VII. 13.

more congenial however to Englishmen is the administration of justice by the common law of England, than by Justinian's code; that we now scarcely hear of a tithe cause sued in the spiritual court, frequently as the title of prohibition appeared formerly in our books: nor does the clergy manifest any jealousy, at the administration of justice by the temporal courts: nor is there now heard a murmur suggesting, that the temporal judges are more disposed to grant *prohibitions*, by which the power of the spiritual court is ousted, than *consultations*, by which it is restored to them. Without going into the particulars of each of the 25 objections by the spiritual, and the answers given to them by the temporal judges, I shall select so much from the answers as will disclose the principles and doctrine, in which the good understanding of the different courts is founded, and on which it will in the probable occurrences of human events be perpetuated.

Form of prohibition can only be altered by parliament.

* It is true, that both the jurisdictions were ever *de jure* in the crown, though one were sometimes usurped by the see of Rome; but neither in the one time, nor in the other, has ever the form of prohibition been altered, nor can be but by parliament. And it is *contra coronam et dignitatem regiam* for any to usurp to deal in that, which they have not lawful warrant from the crown to deal in, or to take from the temporal jurisdiction that which belongs to it. The prohibitions do not import, that the ecclesiastical courts are *aliud* then the king's, or not the king's courts; but do import, that the cause is drawn into *aliud examen*, than it ought to be. And therefore it is always said in the prohibition, (be the court temporal or ecclesiastical, to which it is awarded,) if they deal in any case, which they have not power to hold plea of, that the cause is drawn *ad aliud examen* than it ought to be: and therefore *contra coronam et dignitatem regiam*. Prohibitions by law are to be granted at any time, to restrain a court to intermeddle with, or execute any thing, which by law they ought not to hold plea of.

Prohibitions may be after as well as before judgment and execution.

So the king's courts that may award prohibitions, being informed either by the parties themselves, or by any stranger, that any court temporal or ecclesiastical holds plea of that (whereof they have not jurisdiction) may lawfully prohibit the same, as well after judgment and execution, as before.

The grounds on which temporal judges grant prohibitions, &c.

If we find the declaration upon the surmise, upon which the prohibition is granted, not to warrant the surmise, then we forthwith grant a consultation in that form, which is mentioned, and

* Vide 2 Inst. 602, &c.

that matter being mentioned in the consultation would be very long and cumbersome, and give the ecclesiastical court little information, to direct them in any thing thereafter; and therefore in such cases, for brevity sake, it is usual; but when the matter is to receive end by demurrer in law, or trial, the consultation is in another form, for a prohibition is grounded upon the libel, and the consultation must agree therewith also; and therefore we doubt not, but the ground of this grievance, when it is well looked into, will grow from themselves: for many turbulent ministers do infinitely vex their parishioners for such kinds of tithes, as they never had, whereby many parishes have been much impoverished: and for example, we shall shew on record, wherein the minister did demand seventeen several kinds of tithes, whereupon the party suing a prohibition had eight or nine of them adjudged against the minister upon demurrer in law, and other passed against him by trial, and this must of necessity grow to a matter of great charge; but where is the fault, but in the minister that gave occasion? And we will shew one other record, wherein the party confessed to some of us, that he was to sue his parishioner but for a calf and a goose; and that his proctor nevertheless put in the libel or demand of tithes, of seven or eight things more than he had cause to sue for: this enlarged the prohibition, and gave occasion for more expence than needed; and where is the fault of this, but in the ecclesiastical courts.

Prohibitions are of right not of favour, and must be granted, though no matter of prohibition appear in the libel.

None may pursue in the ecclesiastical court for that, which the king's courts ought to hold plea of, but upon information thereof given to the king's courts, either by the plaintiff, or by any mere stranger, they are to be prohibited; yet prohibitions thereupon are not of favour but of justice to be granted, though in the libel there appear no matter to grant a prohibition, yet upon a collateral surmise the prohibition is to be granted: as where one is sued in a spiritual court for tithes of *silva cædua*, the party may suggest, that they were gross or great trees, and have a prohibition, yet no such matter appears in the libel. So if one be sued there for violent hands laid on a minister by an officer, as constable, he being sued there may suggest, that the plaintiff made an affray upon another, and he to preserve the peace laid hands on him, and so have a prohibition. And so in very many other like cases; and yet upon the libel no matter appears, why a prohibition should be granted: and they will never shew, that a custom to pay pigeons was allowed to discharge the payment of wool, lamb, or such like.

All prescriptions and compositions to be tried at law.

If the question be upon payment, or setting out of tithes we are to leave it to the trial of their law, though the party have but one witness; but where the matter is not determinable in the ecclesiastical court, there lies a prohibition either upon, or without such a surmise. The temporal courts have always granted prohibitions as well in cases *de modo decimandi*, as in cases upon real compositions, either in discharge of tithes, or the manner of tithing; for that *modus decimandi* had its original ground upon some composition in that kind made, and all prescriptions and compositions in these cases are to be tried at the common law, and the ecclesiastical courts ought to be prohibited, if in these cases they had plea in tithes in kind: but if they will sue in the ecclesiastical court *de modo decimandi*, or according to composition, then we prohibit them not.

Law judges only expounders of the statutes.

Where the objection seems to impeach the trial at the common law by jurors, we hold, and shall be able to approve it to be a far better course for matter of fact upon the testimony of witnesses sworn *vivâ voce*, than upon the conscience of any one particular man, being guided by paper proofs; and we never heard it excepted unto heretofore, that any statute should be expounded by any other, than the judges of the land.

Remedy in the law courts under the 2 and 3 Edw. VI.

By the statute 2 and 3 Ed. VI. c. 13. the ecclesiastical court is to hold plea of no more, than that, which is specially thereby limited for them to hold plea of; and the temporal court not restrained thereby, to hold plea of that, which is not limited unto the ecclesiastical court by that act, and of that they had jurisdiction before: and the forfeiture of double value is expressly limited to be recovered before the ecclesiastical judges; but where a forfeiture is given by an act generally not limited where to be recovered, it is to be recovered in the king's temporal courts, and the cause, why it is so divided, seems to be for that, where, by that act, temporal men were to sue for their tithes in the ecclesiastical court, where it was then presumed they were to have no great favour: therefore the party grieved might (if he would) pursue for the forfeiture of the treble value in the temporal court, where he was to recover no tithes; but he would sue, where he might also recover the tithes, then he would pursue for the double value: for that is specially appointed to be recovered in the ecclesiastical court, but not the treble value. And although they alledge, that they sometimes used to maintain suit for the treble value, yet as soon as that was complained of to the king's courts, they gave remedy unto it as appertained.

Where he, that ought to pay predial tithes, does not divide out his tithes, or does in any wise interrupt the parson, or his deputy, to see the dividing or setting of them out, that appearing unto us judicially, we maintain no prohibition upon any suit there for the double value; but if after the tithes severed, the parson will sell the tithes to the party that divided them, upon the surmise thereof, we do, and ought to grant a prohibition; but if that surmise do prove untrue, we do as readily grant a consultation, and the party seeking the same is, according to the statute, to have his double costs and damages. And so all matters incident, that fall out to be merely temporal, are to be dealt withal in the temporal, and not in the ecclesiastical court.

Prohibition of parson to sell his tithes once severed.

If a party excommunicate be imprisoned, we ought upon complaint to send the king's writ for the body and the cause, and if in the return no cause, or no sufficient cause, appear, then we do (as we ought,) set him at liberty; otherwise, if upon removing the body, the matter appear to be of ecclesiastical cognizance, then we remit him again: and this we ought to do in both cases; for the temporal courts must always have an eye, that the ecclesiastical jurisdiction usurp not upon the temporal. And if any by the ecclesiastical authority commit any man to prison, upon complaint unto us, that he is imprisoned without just cause, we are to send to have the body, and to be certified of the cause; and if they will not certify unto us the particular cause, but generally, without expressing any particular cause, whereby it may appear unto us to be a matter of the ecclesiastical cognizance, and his imprisonment be just, then we do, and ought, and are bounden by oath to deliver him.

Temporal judges will release an excommunicated person if no cause shewn.

Where parties are proceeded withal *ex officio*, there needs no libel, yet ought they to have the cause made known unto them, for which they are called *ex officio*, before they are examined, to the end it may appear unto them before their examination, whether the cause be of ecclesiastical cognizance, otherwise they ought not to examine them upon oath. As excommunication cannot be gainsaid, neither may the prohibition be denied upon the surmise made, that the matter pursued in the ecclesiastical court is of temporal cognizance; but as soon as that shall appear unto us judicially to be false, we grant the consultation: and if it fall out, that they err in judgment, it cannot otherwise be reformed, but judicially in a superiour court, or by parliament.

Spiritual court ought not to examine on oath, if cause be not of spiritual cognizance.

Leaving the more ancient statute law, by which the jurisdiction of the spiritual courts was affected, we look up to those laws,

Era of reformation and lay impropriators.

which passed upon this subject at and from the time of the Reformation, which gave rise to a new era in the system of tithing, by letting in several thousand *impropriators*, or lay persons, to their enjoyment: a species of possessors of church livings, till then unknown in this country. Thus it is to be noted, that by the before-mentioned act of the 27th Hen. VIII. against substraction of tithes *,

Peculiarities of the 27th H. 8.

1st, This act extends to all sorts of tithes, offerings, &c. personal and mixed, as well as predial. 2d, That he that will have the benefit of this law, must sue for the single value only, and not for the double value, as upon the 2 Ed. VI. 3d, That the plaintiff in the ecclesiastical court may proceed upon this act for contempt, contumacy, or misdemeanour, as well before as after sentence. 4th, That the security taken upon this act may be as well by bond as by recognizance. 5th, That the tithes, and other church duties are to be paid according to the ecclesiastical laws, and the laudable customs and usages of the place. 6th, The suit is to be before such judge, as has jurisdiction of the cause, that is, either spiritual or temporal. So that it create or enlarge no jurisdiction.

Effect of 32 Hen. 8. in favour of lay impropriators.

After that statute upon the dissolution of abbies, tithes came to the king, and from him to divers laymen, who by course of the ecclesiastical laws could not sue for them in the ecclesiastical courts: wherefore the before-mentioned act of 32 Hen. VIII. was made for their relief, entitled, *An act how tithes ought to be paid, and how to be recovered being not paid* †: Upon which act Sir *Simon Degge* has thus observed ‡: 1st, That it appears by the preamble to be principally designed for relief of lay impropriators, who before this act were not capacitated to sue in the spiritual courts for the substraction of tithes, and were hard put to it to find any other relief.

2d, Where by the former act the party for contumacy, &c. might be compelled to give security before sentence; now hereby, in the case of lay impropriators, the party cannot be compelled to give security till after definitive sentence.

3d, By this statute there must be two sureties at the least; but upon the former act one surety sufficed.

4th, The security on this act, as well as on the former, may be either by bond, or by recognizance.

5th, He that will sue upon this act, must sue for the single only, and not for the double value, as upon 2 Edw. VI. See *Hard.* 5.

* For which see App. No. XXII. Boh. 357. † 32 H. 8. c. 7. and vid. the act in the App. No. XXVII. ‡ Deg. p. 2. c. 26.

6th, That this act, as well as the former, extends to all manner of tithes and offerings.

7th, That London is excepted out of this act, as it was out of the former.

8th, That this only extends to customary tithes, and not to tithes due by canon and ecclesiastical laws.

9th, That it only extends to such, as shall obstinately and wilfully refuse to perform the sentence of the ecclesiastical judge, and for no other contempt or neglect.

10th, That this act restrains the suit (for not setting forth or detaining, &c. of tithes, &c.) to the ecclesiastical courts; whereas otherwise an action would have lain at common law.

2 and 3 Ed. 6. more favourable to lay impropriators.

But divers defects appearing in the above statute, with respect to lay impropriators, they afterwards obtained a more effectual law for their purpose, viz. stat. 2 and 3 Ed. 6. c. 13.

Tithes become temporal inheritances.

Also note, by my Lord *Coke*'s opinion, 1 Inst. 159. a. the above statute does not only give remedy in the temporal courts for tithes, but also for pensions, and other ecclesiastical or spiritual profits, where the lay owner is disseised, deforced, wronged, or otherwise kept or put from the same. Also for the tithes and other ecclesiastical duties, which came to the crown by 27 H. VIII. 31 H. VIII. 37 H. VIII. and 12 Ed. VI. are by those statutes, and this of 32 H. VIII. and 1 and 2 P. and M. in the hands of laymen, now became mere temporal inheritances, and shall be assets; husbands shall be tenants by curtesy and wives endowed of them, and have other incidents of temporal inheritances; only by this statute they still retained this ecclesiastical quality, that the owner might sue for substraction thereof in the spiritual court.

Yet might the layowner sue for the substraction of them in court Christian.

Prohibition to costs as well as to the principal suit, where the spiritual court had not originally cognizance of the cause.

It is to be further observed, that although by this statute the appellant shall pay costs of suit to the other party, yet it has been ruled, that if sentence be given in the spiritual court, and costs there taxed, and the defendant bring an appeal, yet if the suit did not appertain originally or properly to them, a prohibition shall be awarded as well to the costs as to the principal suit. For that the statute is to take place only, when the cause properly belongs to the spiritual court*. And accordingly the case was, A. parson of B. sued for tithes in the spiritual court; and C. the rector of D. came in *pro interesse suo* there, and said, that the lands, for which the tithes are demanded were within his parish: upon which they were at issue; and it being found for him, sentence was accord-

* Noy 137. anon.

ingly given for him: A. appeals, &c. and pending the appeal, costs were assessed against him in the first court, according to this statute, and process thereupon awarded. In this case A. (because the issue was triable only at common law) brought a prohibition to the first court, from which he had appealed; but because no suit was there depending, for that he had removed thence by appeal, a consultation was awarded; and holden, that they might well proceed for the costs: but if he had not removed his suit by appeal, a prohibition had been maintainable for him as to the costs, as well as for the principal, although he were party to the libel *.

So also, if any one be sued or drawn into the spiritual court for any matter, contrary to the said statute, a prohibition lies, as in *White's* case †.

Substraction of tithes is local.

In *Machin* v. *Maultin*, A. D. 1699 ‡, in a declaration on a prohibition, the case was: A. living in Nottingham, within the province of York, there substracted tithes, and then removed into Lincolnshire, within the province of Canterbury, and afterwards he happened to go to York, and was there sued in the court of the archbishop for the said substraction, and obtained a prohibition of the said statute 32 H. VIII. for citing him out of the diocess, &c. but after debate, a consultation was awarded: for that the substraction of tithes is local, and must be sued before the ordinary of the place, where the wrong is done; but it is otherwise in cases transitory, *ubi forum sequitur reum;* and in this case it was urged by the counsel, that this is not a citing out of the diocess within the statute, because the diocess, where he lived had not jurisdiction; and if he might not be cited in this case, the fact would be remediless and dispunishable §.

In transitory cases *forum sequitur reum.*

But divers defects in the said statutes of 27 H. VIII. c. 20, and 32 H. VIII. c. 7. afterwards appearing, (especially as to the relief of lay impropriators, who were never favoured in the ecclesiastical courts) a further provision was made for regulating and enforcing the payment of tithes, &c. by stat. 2 and 3 Ed. VI. c. 13. This act of Edw. VI. is the grand statute directory of the subsisting powers and jurisdiction of the spiritual courts, and the reader is referred back to what has been said of it p. 164. It will be my remaining task to notice the principal determinations of our

* *Transan* v. *Medcalfe*, in B. R. 1 Leon. 130, A. D. 1588. † 1 Cro. 151. A, D. 1589. ‡ 5 Mod. 450. 2 Salk. 549, 12 Mod. 252. § See God. 191. 1 Rol. Rep. 328. 1 Cro. 97. 13 Co. 4. 2 Brownl. 21, 28. 2 Rol. Rep. 428. Winch. 570. 3 Mod. 211.

law courts, that have controuled, regulated, and established the present system of proceeding, and exercise of the jurisdiction of the spiritual courts.

The temporal judges may direct, controul, and command the spiritual, but not *vice versâ*.

One of the leading cases, which establishes the principle of the jurisdiction of the spiritual courts, is that of *Fuller* v. *Clement and Wikard*, quoted by Lord Chief Justice *Coke* in *Robert's* case *, A. D. 1610, in which *Wray* and the whole court of King's Bench held, that where the original matter belongs to the ecclesiastical court, the determination of all that, which depends upon it, belongs to the judges of the same court, although the matter be triable by the common law. But where the original matter belongs to the common law, and is there commenced, and issue is taken upon matter triable by the ecclesiastical law, there the judges of our law shall write to the judges of the ecclesiastisal court to try it, and to certify: and the reason of this diversity is, that our judges have authority to write and command them by the king's writ to certify to them; but they cannot write to the judges of our law to try any thing, and certify them, for they have no such authority to command by writ, but they are to obey the writs of the king, and in divers cases the judges of the common law write to the ecclesiastical judges, commanding them to certify some thing put in issue; and the judges of our law prohibit the ecclesiastical judges to hold plea of some things, which are determinable at common law; but the ecclesiastical court has not power to write to our judges, or to command them, or to prohibit them, when they hold plea of things determinable by the ecclesiastical judges: but this is erroneous, and shall be reversed by error. And on the other side, if in the ecclesiastical court the suit be for a legacy, or tithes, or composition for tithes, and the defendant plead a release; if in the admitting or rejecting of proofs concerning this release, which is matter determinable at common law, they do wrong to the plaintiff or defendant, they have no remedy but by way of appeal. And it was further resolved, that if upon consultation with men learned in the law, they give sentence according to law, this is well done, and no prohibition ought to be granted; but if they take upon them to draw the interest of any man *ad aliud examen*; and to judge against the rule of law, concerning the inheritance or interest of any, there prohibition lies: and that by the ecclesiastical law, a stranger may come in *pro interesse suo*; and when they have jurisdiction of the original cause of the suit, the tempo-

* 12 Co. 65.

ral courts ought not to draw in question their order and proceeding; but if they proceed *inverso ordine*, or not observing form, this ought to be redressed by appeal: and although the matter depending upon the original cause be determinable by the common law, yet it shall be determined, as it has been said, in the ecclesiastical court. And it was still further resolved, that a surmise, that the party has but one witness (which in the ecclesiastical court is *nullus testis*,) is not sufficient to have a prohibition, because the ecclesiastical court has jurisdiction of the principal; and if such surmise shall be sufficient, all suits in the ecclesiastical court shall be either delayed, or quite taken away, for such a surmise may be made in every case; and the plaintiff in the ecclesiastical court cannot have any good answer to it, to have a consultation.

Where the spiritual court had original cognizance of the cause, appeal and not prohibition the remedy.

In the like spirit had previously been determined the case of *Blackwell*, A. D. 1601 *, where a parishioner had severed the tithes from the nine parts; but being in a close, the gate was locked, so that the parson could not come at them, and he sued in the spiritual court: and there the question was, whether the gate were locked or open. And thereupon a prohibition was brought, supposing this to have been a temporal matter; for the tithes being severed are lay chattels. But the court said, that although the tithes be severed, yet by the statute they remain triable in the spiritual court. And then the other is but a consequent thereof, and therefore is there triable. And if they refuse to allow his proofs, as it was surmised, (but not within the prohibition); it was said, that he ought to appeal.

Spiritual court has cognizance of a refusal to set out tithes.

In the case of *Gale* v. *Ewer*, A. D. 1695 †, the court of king's bench held, that the spiritual court had cognizance of a refusal to set out tithes; for the clause, which gives double value for carrying away corn, &c. before tithes set out, gives the spiritual court cognizance for refusing to set out tithes. It was ‡ there urged, that the spiritual court ought not to proceed for the setting out of tithes without notice given to the rector; for although the ecclesiastical law require notice to the parson, when the tithes are severed, yet the common law requires no such thing; as Hutton said it had been adjudged, (Noy. 19.) The statute of 2 and 3 Edw. VI. c. 13. says only, it shall be lawful for every party, to whom any of the said tithes ought to be paid, &c. to view and see the said tithes justly and truly set forth, and the same quietly to take and

* Cro. El. 843. † 1 Com. Rep. 22. ‡ 2 Rol. Ab. 299.

carry away, &c.; and although, as to the taking and carrying, this statute be declaratory, yet as to the view, it is introductory of a new law, as it appears, (2 Inst. 650.) And the penning of this act is, that it shall be lawful to view, &c. which shews the intent of the legislature was not that the parishioners should give notice thereof: and that no notice is necessary, has been sometimes adjudged *. And of the same opinion was the court in that case; and a prohibition was granted as to the suit for not giving notice of setting out the tithe. It was urged on the other side that this matter ought to have been pleaded in the spiritual court. But *Holt* Chief Justice answered to that, that there was no necessity, that it should be so pleaded, forasmuch as it appeared upon the face of the libel that the suit was for setting out tithes without giving notice. It would have been otherwise if the suit had been for refusing to set out tithes. The plea, that the tithes were severed, is no good cause for a prohibition, unless they refuse that plea, for want of notice given of the severance. But *Holt* Chief Justice thought the turning of cattle into the tithe made it a fraudulent severance, and that a suit might be maintained for it in the spiritual court.

Parishioners not obliged by 2 and 3 Ed. VI. to give notice of their setting out the tithes.

A modus must be sued for in the spiritual court, as well as the tithes in kind, as appears by *Scott* v. *Wale* †, A. D. 1682, in C. B. where the court said, that the *modus decimandi* must be sued for in the ecclesiastical court, as well as the very tithe; and if it be allowed between the parties, they shall proceed there; but, if the custom be denied, it must be tried at the common law; and if it be found for the custom, then a consultation must go, otherwise shall the prohibition stand. This doctrine was explicitly set forth by Lord Hardwicke in *Rotherham* v. *Fenshaw*, A. D. 1748 ‡, on a bill having been filed to establish a modus, and for an injunction to stay the proceedings of the spiritual court upon the bare suggestion of a modus by his bill. The ecclesiastical court has a right to retain suits for tithes, whether at the instance of a spiritual person or lay impropriator. There may be a suit too in that court for a modus, as well as for tithes in kind. The defendant likewise may plead a *modus* there: if admitted, the ecclesiastical court may go on upon the modus; if denied, the ecclesiastical court cannot proceed *propter triationis defectum*; and if so, it is the common suggestion for a prohibition in the court of king's bench; but, if you

A modus is to be tried in the spiritual court, but if there denied, must be tried at common law.

Spiritual court cannot proceed on a modus denied *propter triationis defectum.*

* 1 Rol. Ab. 643. *Chase* v. *Ware*, B. R. afterwards affirmed in error, *Linston* v. *Maurice*, Style, 342. anon. 2 Vent. 48. † Hob. 247. ‡ 3 Atk. 628.

go thither for a prohibition, you must first shew the modus has been pleaded in the ecclesiastical court, and denied there. No such thing has been shewn in this case; but a bill is brought to establish a modus and prays an injunction to stay proceedings in the ecclesiastical court, upon the suggestion of a modus only. I cannot grant an injunction here, but upon the same grounds, as a court of law would grant a prohibition *propter triationis defectum*. Injunctions in this court are granted upon a suggestion of something, which affects the right or convenience of the party in the proceedings in the other court, or where there is a concurrent jurisdiction. The modus is not admitted by the answer to the bill in this court, and if insufficient, you may except to the answer; and even if the suit go on in the spiritual court, and a sentence be pronounced for the tithes, it is no prejudice at all to the plaintiff in his suit depending here. But, if I were to grant this motion, I should take away the jurisdiction of the spiritual court on the one hand, and of the court of common law on the other.

Same rule as to prescribing in *non decimando* for lay and for spiritual persons.

As to the non-payment of the tithe hay, it is insisted, the owner of the land was formerly a purchaser of the tithes, and has enjoyed the land and tithes together for a great length of time, which is presumptive evidence of his right. But this is not a ground for an injunction in a case of this nature. A lay impropriator is to be sure different from a spiritual in some respects. Since the Reformation, and the acts for dissolution of monasteries, tithes by grants from the crown are become lay fees; so that in fact lay impropriators have as much power to convey a portion of tithes as any part of the land itself: and therefore it was said, it is hard the plaintiff should not in this case have the same advantage of presumptive evidence from long possession in the case of tithes, as well as in any other case relating to an estate of inheritance: and it was a saying of L. C. Justice *Hale*, he would presume even an act of parliament made in favour of length of possession: but the court of exchequer, in the case of *The Aldermen of Bury* v. *Evans*, A.D. 1740 *, would not lay down a different rule, as to prescribing in *non decimando* in regard to lay impropriators and spiritual persons, but held such a prescription equally bad against both. He saw no reason for the injunction. Why did not the plaintiff go upon the length of possession in the ecclesiastical courts? He might have pleaded it there, as well as insisted upon it here in his bill; and if the ecclesiastical court would not determine upon the same evi-

* Com. Rep. 643.

dence as a court of common law would have done, it is the usual ground for a prohibition; and no other court has the cognizance of it but the court of king's bench; therefore his lordship would not make such a precedent, as by a side wind would take away the jurisdiction of both courts at once, and denied the motion.

Suit lies in court Christian against the owner of tithes who detains them, not so against a stranger.

In *Leigh* v. *Wood* *, A. D. 1598, in B. R, it was a question before the court (upon which the court divided equally) whether for detaining tithes by the owner after he had set them forth, suit lay in court *Christian*. *Gawdy* and *Popham*, who were for the suits lying in the spiritual court, said against the party himself, who set forth his tithes, a suit is well maintainable in the spiritual court, if he detain them, although the parson, (if he would) might have his remedy at the common law. But, if a stranger take them after they are set forth, his remedy is only at the common law. And the statute of 32 H. VIII. proves it: for the words thereof are, if any do not set out, or do detain, or withhold his tithes, (which is to be intended after they are set out,) he shall be sued in the court *Christian*, &c. For otherwise mischief might ensue to the parson, by his secretly setting his tithes forth, so that the parson should not know thereof, and then he might afterwards carry them away.

Parson may sue in spiritual court, if obstructed in the way to take away his tithes.

In *Halsey* v. *Halsey* †, 1630, B. R., the court was of opinion upon the statute of 2 and 3 Ed. VI. that the parson must have a convenient way, and that it must be neither craggy nor swampy, according to Linwood *de decimis*: and the spiritual court having conusance of tithes, which are the principal, shall also have conusance of the way, through which it is necessary to convey the tithes: for *qui tollit medium, tollit finem*. Upon a similar principal did the same court in 1611 determine, that a parishioner's obstruction of the ordinary way for taking away tithes was an object within the cognizance of the spiritual court. The parson libelled for his tithes ‡; but a prohibition was granted, upon a supposition, that here was no question at all as to the payment of tithes, but as touching the way to come for them. And upon this whole matter the parson prayed a consultation. The whole court were clearly of opinion, that such a setting out of tithes, as it appeared to be in this case, without suffering the parson to come and take them away, was fraudulent, and not a good and sufficient setting out of tithes according to the statute, and as the statute requires, which

* Moor, 912. † 1 Jon. 230. c. 2. Gwil. 469, from Bridgeman's MS.
‡ 1 Bals. 108. anon.

ought to be fruitful and effectual: for he ought to set them out, and also to suffer the parson to come, have, and take them away, otherwise the mere setting of them out, and the suggestion of the way, are to no purpose. And so, without any further motion or argument, by the rule of the court, a consultation was granted.

Important Judgment of Lord Ch. J. Willes.

In 1757, Lord Chief Justice Willes, in the case of *Cheeseman* v. *Hoby*, delivered a judgment, which is one of the more modern and instructive judgments, given upon principle, in contravention of many old cases, which appears to justify the frequent observations, that the modern doctrine of tithing almost constitutes a new body of decimal jurisprudence *. The opinion of the court was delivered as follows, by Willes, Chief Justice: A prohibition has been moved for to the consistory court of the Bishop of Lincoln. *Hoby*, the lessee of the impropriators, the dean and chapter of Lincoln, had sued *Cheeseman*, who was an occupier of lands in Burringham in the parish of Nottesford, in that court for tithes of hemp and flax. *Cheeseman*, by his plea there insisted, that the tithes were small tithes, and that these tithes or an uncertain composition have been time out of mind paid to the vicar; and he insisted likewise in his plea on an endowment of the vicar in 1310, and on an agreement in 1691 between the vicar and the parishioners. So the question to be tried in the spiritual court is not on a modus, (for it is admitted that tithes in kind are due,) but whether tithes in kind be to be paid to the vicar or the impropriator.

A great many cases were cited, and very properly, but I shall only take notice of a few of them: because there are so many jarring cases on the head of prohibitions, that it is very difficult to reconcile them. For when the power of the church ran very high, the judges were cautious in granting prohibitions: when it did not run so very high, the judges ventured to go further in granting them.

I admit, that this suit is to be considered as between ecclesiastical persons; for *Cheeseman* insists on the right of the vicar, and *Hoby* claims under the right of the dean and chapter, who must be considered as ecclesiastics, when they insist upon an ecclesiastical right. But the rule, that has been laid down, that when both parties are ecclesiastics, courts of law ought not to grant a prohibition, I do not at all rely on, because I think it a very absurd one, and without the least color of reason. For though one of the parties be a layman, if he do not insist on a modus or some

Rule that both parties to a suit in court Christian should be spiritual, denied.

* Willes's Rep. 680.

other matter properly triable at common law, the court Christian must determine the matter, and a prohibition will not be granted: on the other hand, though both parties be ecclesiastics, if either of them insist upon a deed or other matter properly triable at common law, a prohibition will certainly lie. What is said by Lord *Coke* and *Hobart*, and in several other books, that where a custom is insisted on contrary to common right a prohibition ought to go, does not at all affect the present case; because here, the common right, which is the payment of tithes, is admitted, and the question is only, to whom they are payable.

But we found our opinions on the judgment in the case of *Drake* v. *Taylor*, 1 Str. 87. and the reason, which is given for it at the latter end of the case; for those given in the first part I think very weak. The case there is the same as this; for it is between a vicar and an occupier of lands, who insisted on the right of a lay impropriator, and that the tithes claimed had time out of mind been paid to him. A prohibition was denied by the whole court *; and the reason assigned at the latter end of the case is, that the custom there insisted on relating to a spiritual matter, and not any temporal right, or in bar of any ecclesiastical right, ought to be tried in the spiritual court, because fifty years make a custom by the ecclesiastical law; and therefore if the courts of law were to judge of such a custom, they would judge by a wrong rule. And for this reason we refuse a prohibition in the present case.

If *Cheeseman* had insisted on a modus payable time out of mind to the vicar, a prohibition ought to go, because the spiritual court could not try the modus. But, as the right to tithes is admitted, and the only question is, whether they be to be paid to the rector or the vicar, we are of opinion, that the point in question is proper to be tried in the spiritual court. The endowment in 1310, and the memorandum in 1691, in respect to the present motion, are quite out of the case. For these reasons we are all of opinion, that the rule for a prohibition ought to be discharged.

Appropriations triable at common law.

It is a question triable by common law, and not in the spiritual court, whether a church be impropriate or not: as was decided in *Owen* v. *Parishioners of All Saints, Northampton*, 1615 †, where *Coke*, C. J. *ex assensu Croke*, *Dodderidge*, and *Houghton*, Justices, was of opinion, that a prohibition should be granted; for whether a church be appropriated or not, is a thing triable

* A prohibition had been denied by the courts of exchequer and common pleas.

† 1 Gwil. 278. from Calthorpe's MS.

at common law: for an appropriation by reason of the interest, which the king has to present by reason of lapse, or of the minority of the heir of his tenant, cannot be made without the king's assent under his letters patent, as may be seen by 5 Ed. III. and 12 Ed. III. And where the spiritual law is mixed with the temporal law, there, the temporal law shall always have the jurisdiction, as being the elder sister. Besides, it would be a mischievous thing, that the spiritual law should try the validity of an appropriation, where it has been given to the king by an act of parliament, and by the king to one of his subjects under his letters patent, and so, as come by mesne conveyances to several other persons; for that would be to try the inheritances of men, which it does not belong to the spiritual law to do, but only to the common law. Indeed, the trial of a union and consolidation belongs to the spiritual law, because it is made by the ordinary without the assent of the patron or king. And *Coke*, Chief Justice, said, that a reputative appropriation is given to the king by the statute of 31 H. VIII. c. 13. though it may not be an appropriation within the strict rules of law: and for that reason he had known it decreed in chancery upon the opinion of the justices, that where an appropriation was made with the assent of the king, the patron, and the ordinary, it should be given to the king, notwithstanding the patron, who assented was only tenant in tail, and so his assent was determined upon his death, and therefore it was an appropriation in reputation merely, and not in fact, at the time of the making of the act. It has also been lately adjudged in the common pleas, that notwithstanding a vicar were not endowed according to the statutes of 15 Ric. II. and 4 Hen. IV. and therefore the appropriation was void by those statutes: yet such appropriation being an appropriation in reputation, was given to the king by the above statutes, and could not be avoided for this defect. And *Doddridge*, Justice, said, that there are few appropriations in England which have all the ceremonies required by the law to the making of an appropriation. Yet if any fraud be practised upon a customary payment in depriving the parson of his dues, it gives no right to the spiritual court to award payment of tithes in kind, nor to take cognizance of the fraud: the remedy for that being by action on the case at common law*. Likewise pending a suit in prohibition upon suggestion of a modus, the spiritual court cannot entertain a libel for tithes of another year accrued subsequently to

Union and consolidation triable in court Christian.

* *Stubbs* v. *Goodluck*, Moore 913.

the commencement of the suit in prohibition *. In the case of *Sir Edward Blackett* v. *Dr. Finnay*, 1724 †, the court of exchequer granted an injunction to stay proceedings in the spiritual court, because there being some dispute between the parties, whether the modus were as alledged in the bill, and as the spiritual court could not try the modus, they granted the injunction.

Collateral matter arising does not oust the spiritual court of their jurisdiction, if they proceed not to try it.

Where the spiritual court has original jurisdiction of a suit, and some matter arises or is stated in that suit, which exceeds the jurisdiction of the spiritual court, that suffices not to oust the spiritual court of jurisdiction, provided they proceed not to try that question, which would be out of their jurisdiction. On this ground the court of common pleas refused a prohibition in *Dutens* and *Robson*, A. D. 1787 ‡.

Spiritual court has cognizance of the extent of an endowment.

Besides the peculiar objects of the jurisdiction of the spiritual courts, under the 2d and 3d of Edw. VI, which have before been noticed, there are other matters, which often occur in suits for tithes, which fall immediately and exclusively within their cognizance: such as the construction and extent of endowments §. As where a mill was erected upon glebe land, parcel of a parsonage, which came to the king by the statute of dissolutions: the vicar, who was endowed with small tithes, sued the parson for the tithes of the mill: the parson applied for a prohibition, 1st, Because the glebe, upon which the mill was erected was discharged of the payment of tithes: 2d, Because the vicar's endowment did not extend to the tithes of a mill. But the prohibition was denied; for the mill having been lately erected, tithes ought to be paid for it, and the extent of the endowment was a matter triable in the spiritual court. The discharge of a glebe could not extend to a mill erected *de novo*.

* *Linge* v. *Gunter*, 1 Gwil. 373. 1619. B. R. from Calth. MS. † Bunb. 176. ‡ 1 Hen. Black. 100. § Anon. 1617, 1 Gwil 286. from Calth. MS.

BOOK III.—CHAP. II.

Of Actions, Suits, and Process concerning Tithes in the temporal Courts of Common Law.

Tithe causes tried originally in the temporal courts.

IT has been before remarked, that anciently the cognizance and jurisdiction of tithe causes belonged to the temporal courts, in which, notwithstanding, the bishop had a seat with a share in the judicature. It would be matter more of historical curiosity, than of legal utility or information, to enter into a minute disquisition of the original creation, the splitting, the transfer, and the ultimate settlement of this cognizance and jurisdiction. Mr. *Selden** has divided the periods into three: 1st, That under the Saxons: 2d, That under the Normans†, till about Hen. II. (which brings us to the time of memory, viz, 1 Ric. I. his immediate successor.) 3d, What intervened between that and his day. As to this last period that diligent and judicious investigator said, "Neverthelesse "in the sundrie ages since, the determination of the right and "payment of tithes hath been subject to the temporalle courts, by "divers kinds of originalle proceeding, which for orders sake may "be all comprehended in these five: I. By prohibitions touching "the modus or customs of tithing, or other matter concerning the "king's right, triable only in his own court, or the like. II. The "writ of right of advowson of tithes, whereto you must annex "the writ of *Indicavit*, that is but a special prohibition, making "way for the writ of right of advowson. III. By *scire facias*. "IV. By bare processe of command of payment. V. By the ac-"tions upon the late statute of 32 Hen. VIII. and 2 Ed. VI."

Selden's authority for this.

Writ of assize what.

In considering the different process, which may be had in the temporal courts of common law upon tithes, it will not be impro-

* History of Tithes, c. 14.

† Mr. Selden gives in Latin the law made by the Conqueror for the erection of the ecclesiastical forensic courts and jurisdiction, the material part of which is as follows: "I command and by virtue of my royal authority enjoin, that no bishop or archdeacon, "for the future, hold plea of ecclesiastical laws in the hundred, nor try, before secular "men, causes appertaining to the ordering of the soul: but that whoever shall be called "upon for any cause or offence, according to the ecclesiastical laws, shall appear at the "place the bishop shall choose and appoint for this purpose, and there answer the com-"plaint, and shall do justice not according to the (*jurors*) of the hundred, but according "to the canons and ecclesiastical laws, to God and his bishop. And I also forbid any "layman's interfering with the laws belonging to the bishops."

per, first, to arrest the attention of the reader to that sort of remedy, which though but seldom, may in some cases be resorted to; which is the writ of assize. And this remedy is said to have been invented by *Glanvil*, chief justice to Henry the second; and if so, it seems to owe its introduction to the parliament holden at Northampton, A. D. 1176, when justices *in eyre* were appointed to go round the kingdom in order to take these assizes. As a writ of entry is a real action, which disproves the title of the tenant, by shewing the unlawful commencement of his possession; so an assize is a real action, which proves the title of the demandant, merely by shewing his, or his ancestor's possession: and these two remedies are in all other respects so totally alike, that a judgment or recovery in one is a bar against the other, so that when a man's possession is once established by either of these possessory actions, it can never be disturbed by the same adversary in any other of them. The word assize is derived by Sir *Edward Coke* *, from the latin *assideo*, to sit together; and it signifies, originally, the jury who try the cause, and sit together for that purpose. By a figure it is now made to signify the court or jurisdiction, which summons this jury together by a commission of assize, or *ad assisas capiendas*; and hence the judicial assemblies holden by the king's commission in every county, as well to take these writs of assize, as try causes of *nisi prius*, are termed in common speech the assizes. By another somewhat similar figure, the name of assize is also applied to this action, for recovering possession of land or hereditaments: for the reason, says Littleton, why such writs at the beginning were called assizes, was, for that in these writs the sheriff is ordered to summon a jury, or assize; which is not expressed in any other original writ.

Assize of novel disseisin.

This remedy, by writ of assize, is only applicable to two species of injury by ouster, viz. *abatement*, and a recent or *novel disseisin*. The latter of which alone, bearing upon the subject under our present consideration, is an action in which the demandant's possession must be shewn. It recites a complaint by the demandant of the disseisin committed, in terms of direct averment; whereupon the sheriff is commanded to reseise the land or hereditaments, and all the chattels thereon, and keep the same in his custody till the arrival of the justices of assize; (which since the introduction of giving damages, as well as the possession, is now omitted †) and in the mean time to summon a jury to view the premises, and

* 1 Inst. 153. † Booth. 211.

make recognition of the assize before the justices *. And if, upon the trial, the demandant can prove first, a title; next, his actual seisin in consequence thereof; and lastly, his disseisin by the present tenant; he shall have judgment to recover his seisin, and damages for the injury sustained.

The process of assizes in general is called by statute Westm. 2, 13 Edw. I. c. 24, *festinum remedium*, in comparison of that by a writ of entry; as it does not admit of many dilatory pleas and proceedings, to which other real actions are subject.

Limitation of actions.

In all these possessory actions there is a time of limitation settled, beyond which no man shall avail himself of the possession of himself or his ancestors, or take advantage of the wrongful possession of his adversary. For if he be negligent for a long and unreasonable time, the law refuses afterwards to lend him any assistance, to recover the possession merely; both to punish his neglect, *(nam leges vigilantibus, non dormientibus, subveniunt)* and also because it is presumed, that the supposed wrong-doer has in such a length of time procured a legal title, otherwise he would have been sooner sued. This time of limitation is now fixed at fifty years for lands, and the like period for customary or prescriptive rents, suits, and services, (for there is no time of limitation upon rents reserved by deed †.) And no person shall bring any possessory action, to recover possession thereof merely upon the seisin, or dispossession of his ancestors, beyond such certain period. And all writs, grounded upon the possession of the demandant himself, are directed to be sued out within thirty years after the disseisin complained of; for if it be an older date, it can with no propriety be called a fresh, recent, or novel disseisin: which name, Sir *Edward Coke* informs us, was originally given to this proceeding, because the disseisin must have been since the last eyre or circuit of the justices, which happened once in seven years, otherwise the action was gone ‡.

Illustrative case from the year books.

It appears from a very special case in the year book §, that an assise did not then lie for tithes, but that if the lord, (in that case he was a prior) reserved the tenth part of the corn or such thing, he should have an assise of such as a profit *apprendre* ‖.

* Fitzh. N. B. 177. † 8 Rep. 65. ‡ 1 Inst. 153. Booth. 210. For the form of a writ of *novel desseisin*, vide App. No. LI.

§ 44 Edw. III. 5.

‖ Præcipe quod reddat does not lie of common, but *quod permittat*, and the like of other profits *apprendre*, which lie in *prender*, and not in *render*. For at common law no action lay of profit *apprender*, but the *quod permittat*. Br. Præcipe, 13.

This case illustrates an observation heretofore made, (p. 85,) that all church lands were not heretofore to be considered as a substitution for the gospel maintenance, and that such part only of them as were cloathed with this quality, fell under the ecclesiastical cognizance: for in that case the prior had the inheritance of the lands in him, and also of the tithes arising out of those lands, and from those two separate rights, several titles arose cognizable by several jurisdictions. And it appears from a case in 1553, very fully reported by the Lord *Dyer**, in which he was himself counsel for the plaintiff, that formerly no temporal action lay for tithes, until the statute of 31 Hen. VIII. gave them after the dissolution, and that the appropriated rectories and portions of tithes were given to the crown: then, (as in that case) assize for a portion of tithes would lie for the patentee of the crown. And it was thereby resolved, that assize did lie of tithes in the hands of the *pernor*, without naming the *terre tenant*. And also, that in such an assize for tithes, come to the king's hands by suppression of an abbey, it was sufficient to say, that he was seised thereof in his *demesne as of fee*, without saying in right of his crown: also, that where *dean and chapter* bring an assize for tithes, the name of the dean needs not to be mentioned.

Assize lies for tithes only since the 31 Hen. VIII.

The 1st of the five several kinds of proceeding at common law, mentioned by Mr. Selden, is that of prohibition. We spoke of the general nature of the writ of prohibition, and of the occasions and reasons of its issuing, and of the legislative provisions concerning it in the preceding chapter†. This is the most extensive head of the common law process upon tithes. It is a law process, which was at one time much more frequently resorted to, than it latterly has been‡. Sir *Simon Degge* observes, that prohibitions of themselves are excellent things, where they are used upon just, legal, and true grounds; and have often avoided the usurpations of the popes and spiritual courts. But by the corruption of these later times, they are grown very grievous to the clergy (in the recovering of their tithes and other rights,) being too often granted upon feigned and untrue suggestions, which it is impossible the judges should foresee without the spirit of prophecy. "And, (he adds) "I think I may presume to say, that where one was granted be-"fore Queen Elizabeth's time, there have been a hundred granted

Writ of prohibition more frequent formerly than since.

* *Dean and Chapter of Bristol* v. *Clarke*. Dy. 83.

† For the forms of the writ and other proceedings in prohibition, vide App. No. XLVIII. and No. L.

‡ Degge, p. 2. c. 26.

" in this last age. And they are a very great delay and charge to " the clergy; and it were well (says he) in my poor judgment, if " the reverend judges would think of some way to retain them, or " to make them pay well for their delay, by making the plaintiff " enter into recognizance to pay such costs, as the court, out of " which the issue should award, in case they should not prove " their suggestion in convenient time; or some such other course, " as they in their great wisdom shall think just and meet." The respective rights and jurisdictions of the different courts having been for the last century better understood, and more impartially attended to, the occasions of their collision have been less frequent, and the diminution of applications to the temporal courts for prohibitions have been infinitely more rare within the last century, than they were in that, which preceded the age of prohibitions, which called forth the sympathetic plaints of Sir *Simon Degge*. Ere we enter upon the reasons, causes, and grounds of issuing prohibitions, it will be proper to consider, in addition to the preliminary observations already made, the general practice of the courts, by which prohibitions are granted, and the general mode of proceeding, in order to obtain and prosecute them.

Prohibitions grantable by chancellor and chief justice in 1290.

* The chancellor and chief justice, as was declared as early as the 18 Edw. I. A. D. 1290, had power to determine what ought to be prohibited in causes ecclesiastical, " *in quærimonia populi, &c. cancellarius aut capitalis justiciarius habeat potestatem cognocendi quæ placita supersederi possunt in casibus ecclesiasticis.*" It has accordingly been determined, that not only the Chancery † and the King's Bench may grant prohibitions, but also the Common Pleas ‡, and the Exchequer §; though no pleas be pending of the matter in those respective courts. So also may the courts of law in Chester ‖, to the spiritual courts there, if they exceed their jurisdiction, as well as the court of great sessions in *Wales* ¶. It appears, indeed, to be the received doctrine at present, though there be cases against it, that the King's Bench and Common Pleas ** may grant prohibition in Chester, Lancaster, &c. though the courts there may also do it. These latter cases are not easily to be reconciled with the doctrine of the king's writs not running into the counties Palatine: but the book says, that it is by way of

* Rot. Parliament, 18 Edw. I. 2 Rol. Ab. 316. † Fitzh. N. B. 43.
‡ 2 Rol. Ab. 317, 7 Jac. *Robinson* v. *Elsie*.
§ *Llen.* v. *Seymore Palm.* 525, A. D. 1629. ‖ 2 Rol. Ab. 318.
¶ 1 Sid. 92. ** 2 Rol. 318, *Povey* v. *Ales*, A. D. 1609, and Sir *Timothy Hutton* v. *Bishop of Chester*, A. D. 1614.

reprisal for their encroachments upon the common law: *tho est forsque a reformer le usurpation que ils font al common ley.*

Prohibitions not *ex gratia*, but *debito justitiæ*.

It has been erroneously imagined and set forth in several books, that it was the old doctrine, that prohibitions were grantable by the courts *ex gratiâ* discretionally, and not *ex debito justitiæ*. "For this Lord Hobart is quoted: his words, however, go no further, than to make the court competent judges in the first instance of the truth of the surmise, upon which the prohibition is granted*, without sending the matter of fact to a jury, "for "though the surmise were matter of fact and triable by the jury, "yet it is in the discretion of the court to deny a prohibition, "when it appears unto them, that the surmise is not true." Yet this† discretionary doctrine of prohibitions appears to have been very explicitly holden by Sir *Robert Hyde*, according to the report of Sir *Robert Raymond*‡. *A prohibition doth not lie: and he affirmed, that such writ is ex gratiâ, and not ex debito justitiæ.* But the reporter adds, *Keyling and Twisden positively denied that.* So two years before that last decision, the whole court of King's Bench *were of opinion*, "*that prohibitions* are grantable *ex debito* "*justiciæ*, (and not honorary and in the discretion of the justices "as Hobart said, 67) to prove which, he cited the case of *Wars* v. "*Cliston*, (2 Cro. 351.)" In this latter case, the court of King's Bench laid down this broad position, "If this court have know-"ledge by any means, that the spiritual court meddles with tem-"poral trials, they ought to grant a prohibition. (Vid. 1 Ric. III. "4.)"

General reasons for granting prohibitions.

Generally the temporal courts, which have jurisdiction to superintend inferior courts§, will grant a prohibition to stay the proceedings of an inferior court either *pro defectû jurisdictionis, pro de-*

* Hob. 67, *Parish of Aston* v. *Castle Bitmidge Chapel.*

† Much misapprehension often prevails from inattention to the real import of the terms *ex gratia and discretionally.* Proper ideas of favor and discretion may be had from the words of Sir Jos. Jekyll, 2 Pr. Wms. *Cowper* v. *Cowper*, 753, though proceedings in equity are said to be *secundum discretionem boni viri*, yet when it is asked, *vir bonus est quis?* the answer is, *qui consulta patrum qui leges juraque servat*; and as it is said in *Rook's* case, 5 Rep. 99, 6. that discretion is a science, not to act arbitrarily according to men's wills and private affections: so the discretion, which is executed here, is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to the other; this discretion, in some cases, follows the law implicitly, in others assists it, and advances the remedy; in others again, it relieves against the abuse, or allays the rigour of it; but in no cases does it contradict, or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this court. That is a discretionary power, which neither this nor any other court, not even the highest, acting in a judicial capacity, is by the constitution intrusted with.

‡ Raym. 92, *Ford* v. *Welden*, B. R. 1664. § Bul. N. P. 218.

fectu triationis, or for proceeding, as the law of the land does not warrant. And if the judge or party proceed notwithstanding the prohibition; an attachment may be had against him, or an action upon the case.

Method of moving for a prohibition.

When a prohibition is moved for, the method is for the party to file a suggestion in court, stating the proceedings, that have been had in the court below, and then suggesting the reason, why he prays the prohibition; upon this the court grants a rule for the other party to shew cause, why a writ of prohibition should not issue; and if it appear to the court, that the surmise is not true, or not clearly sufficient to ground the prohibition upon, they will refuse it; otherwise they will make the rule absolute for the prohibition; and if the matter be doubtful, they will order the party to declare in prohibition.

When to declare in prohibition.

When the court inclines to grant a motion for a prohibition*, the defendant has a sort of right to insist, that the plaintiff shall declare; but where the court inclines against the motion, the plaintiff has no such right, for there might be judgment by default, and the court be obliged to prohibit against their own opinion; and it is no injury to the plaintiff, as he may apply to another court.

What the judgment in prohibition.

So where the party is ordered to declare in † prohibition he ought not to take out the writ, but serving the other side with a rule is sufficient; and if in that suit he obtain judgment, the judgment is *stet prohibitio*; otherwise it is *quod eat consultatio*; therefore if the party be excommunicated, the mandatory part of the writ to *assoil* ‡ the party is not to be obeyed till after trial had. In cases of tithe and such sort of matters, where many things are in controversy, it is very frequent to order the prohibition to stand as to part, and a consultation to go as to the other part.

Only 1*s.* damages in prohibition.

§ Where an issue is joined on a declaration in prohibition, if the jury find a verdict for the plaintiff, yet they shall give no more than 1*s.* damages, for it is in nature of an issue to inform the conscience of the court; but after he has had judgment, *quod stet prohibitio*, he may bring his action upon the case, and recover the damages he has sustained.

Prohibition *pro defectu jurisdictionis.*

A prohibition *pro defectû jurisdictionis* is granted as well where the inferior court has a jurisdiction, but exceeds it, as where it has no jurisdiction at all; for if the judge of such inferior court do not act agreeably to the power he has, it is the same, as if he had

* *Rex* v. *Episc. Ely*, Mic. A. D. 1759. † *The Dean and Bishop of Wells*, M. A. D. 1754. ‡ i. e. to absolve or deliver from excommunication.

§ *Carter and Leeds*, *Mic.* 2. *G. II.*

no jurisdiction; therefore though the court will not intermeddle with the determinations of visitors, but presume they have done right while they keep within their visitatorial power, yet if they exceed it, or do not act in a regular visitatorial manner, they will grant a prohibition *.

Where there is no *defectus jurisdictionis*, but only *triationis*, the defendant must plead it below, and have his plea disallowed before he can be entitled to a prohibition.

There is an old statute in the following words, which ascertains in great measure the effects of a consultation granted upon the prohibition †. "Item it is ordered and established of the said assent, "that where a consultation is once duly granted upon a prohibi- "tion made to the ecclesiastical judge, the same judge may pro- "ceed in the cause by virtue of the same consultation, notwith- "standing any other prohibition thereupon to be delivered; pro- "vided always, that the matter in the libel of the said cause be not "ingrossed, inlarged, or otherwise charged ‡." Statute 1 Edw. III.

But this statute has been several times holden to extend to such causes only, where consultations are judicially granted upon examination of the cause, and not where they pass of course, as for want of proof of suggestion, or upon nonsuit for want of prosecution, or where the first was granted for want of a copy of the libel, or such like §. To what cases this statute extends.

In *Bowry* v. *Wallington* ‖, A. D. 1625, the following determination was made upon this statute of Ed. III. "Note, that in this case upon the statute of 50 E. III. it was agreed by the court, that if there be a suit in the ecclesiastical court, and a prohibition awarded, and afterwards consultation granted, then upon the same libel no prohibition shall be granted again; but if there be an appeal in this case, then a prohibition may be granted, but with these differences. Case on the statute.

"1. If he who appeals pray the prohibition, there he shall not have it; for then suits shall be deferred *in infinitum*, in the ecclesiastical courts.

"2. If the prohibition and consultation were upon the body of the matter and the substance of it, for otherwise he shall be put many times to try the same matter, which is full of vexation. And the case was moved again, and argued by *Noy*, which was thus.

* *Dean and Bishop of Gloucester*, Tr. A. D. 1753. Smith and Bradley, E. 1753.

† 50 Edw. III. c. 4. ‡ See Jones, 231, Cro. Car. 208.

§ *Stroud* v. *Hopkins*, 3 Cr. 2080. 1 Jon. 231, A. D. 1631, and *Babington's* case, More 917, A D. 1617. ‖ Popham, 159.

Noy's report of *Bowry* v. *Wallington.*

"*Wallington* libelled in the ecclesiastical court against *Bowry* for tithes of wool and lamb; and *Bowry* upon suggestion of a *modus decimandi* obtained a prohibition, and had an attachment, and declared upon it, and are at issue upon the modus, which is found for the defendant, and consultation granted, whereupon judgment was given in the ecclesiastical court against *Bowry*, upon which *Bowry* appealed, and prayed a new prohibition, and had it, and *Noy* moved for a consultation. 1. Because that a prohibition and an attachment upon it are but one suit for the contempt of the party in bringing his suit in another court, and translating this from the king's court: and when once it is tried for the defendant, the same thing shall not be tried again. And as to the statute of 50 E. III. c. 4. upon the mistake whereof the mistake is raised, he confessed, that the printed books, and also in the extract of the parliament, one roll remaining in the tower is (*the same judge*) but the parliament roll itself, and the petition is, *liceatque judici ecclesiastico sive diocess eidem an hujusmodi*, and the answer to the petition is, one consultation granted sufficeth in this case: and the parliament roll itself was brought into the court and viewed, but he said, that if it were, as it is in the printed book and extract, the same judge shall not be intended the same personal judge, but the same judge of conusance of the same jurisdiction or cause, for otherwise, if another commissary be made, as the bishop may when he will, his successor may be newly prohibited, and also one thing may be infinitely tried, for in many places the suit begins in the arch-deacon's court, and from him an appeal may be brought to the bishop."

Consultation *sub modo.*

Sometimes the court grants a consultation *sub modo*; as where the matter of the libel is in the disjunctive, and as to one part the court has jurisdiction, and to the other not. There the court may grant a consultation as to that part, that the spiritual court has jurisdiction of, and let the prohibition stand as to the other *, or a consultation may be granted, so that the spiritual court allow such plea of such proof †. The six months for the proof of the suggestion under the act of the 2 and 3 Edw. VI. are according to the calendar, and not 28 days to the month ‡. And, in the cases before put, the prohibition shall be general, and the consultation special, *quoad*, &c.

No consultation if suit in ecclesiast-

And it is taken for a rule in *Hobart's* reports, that though a prohibition be faulty, yet the defendant shall never have a consultation,

* *Jeffries's* case, 5 Rep. 68. A. D. 1590. † Lord Rich's case, Poph. 58.

‡ *Copley* v. *Collings*, Hob. 179, A. D. 1017.

if it appear to the court, that the suit in the ecclesiastical court was not well grounded *. tical court not well grounded.

And therefore where one sued for the tithe-corn of sixty acres of land, and the defendant suggested, it was barren ground and paid no tithe, and prayed and had a prohibition, and the jury found thirty acres of it were so, and that the other thirty were barren, but had paid tithe of wool and lamb; and a consultation denied, because it appeared the plaintiff had no cause to sue for the tithe-corn †. So if one lay a modus for the whole town, and prove it for himself only, no consultation shall be granted: so in a prohibition it was suggested, that the parson had twenty acres of land, and ten acres of wood, in discharge of all tithes, and the proof was, that he had twenty acres of land only; and a consultation denied, because it appeared he had no cause of suit ‡. Regularly a prohibition ought not to be granted after sentence, unless it appear the sentence was obtained in the vacation, or by surprise, so that the party had no time to pray it sooner, or upon matter arising after the sentence, and the granting or not granting rests much in the discretion of the court, under all circumstances. And so sometimes upon new matter arising after a consultation a prohibition may be granted, notwithstanding the aforesaid statute of 50 E. III. as where the spiritual court after consultation, proceeds to try matter determinable only at law; or if after a consultation the spiritual court will make an unjust decree, as to award treble damages: and so in all cases, if the spiritual judge will proceed illegally, and against the common law, after a consultation, a new prohibition may thereupon be obtained, but not upon any matter alledged in the libel §. Prohibition after sentence and consultation.

In illustration, explanation, and corroboration of the last mentioned doctrines and positions, the case of *Stratford* v. *Neal* ‖, Mich. 7 Geo. I. in B. R. will not be irrelevant. It was on a writ of error brought here on a judgment in the king's bench in Ireland, viz. one *Neal* libelled in the spiritual court there, for two third parts of the tithes due to him for dry cattle fed in such a parish, and the defendant there suggested for a prohibition, that the cattle, for which those tithes were demanded, were beasts of the plough, and other dry cattle fed in the said parish, with hay and stubbles of corn, for which tithes had already been paid; Case of *Stratford* v. *Neal*,

* *Slade* v. *Drake*, Hob. 300, A. D. 1618. † Anonym. Dyer 171, A. D. 1559. ‡ *Austin* v. *Pigott*, Moore 911, A. D 1599.

§ *Farmer's* case, 286 Hob. A. D. 1610, and 1 Cro. 736.

‖ A. D. 1723, reported by Fortescue, 350. Strange 482, and 8 Mod. 1.

whereupon a prohibition was granted; and that the right might come in question, the said *Stratford* was ordered to declare upon the prohibition, which he did in the same manner as he had before suggested, and concluded his declaration, that the defendant had proceeded in the spiritual court after a prohibition delivered, &c. *Et contra prohibitionem, &c.*

The defendant pleaded, that the cattle, for which he had demanded the said tithes, were not such as the plaintiff had set forth in his declaration, nor fed with such hay and stubble; and further, that he had a right to two integral parts of the tithes of all dry cattle fed in that parish, and that he had not proceeded *contra formam prohibitionis.*

Upon this they were at issue, and the defendant had a verdict, and judgment for a consultation, which was accordingly awarded. On which judgment *Stratford* brought a writ of error, and it was urged for him, that there was a variance in the pleadings, and the verdict would not support the said judgment.

Fortescue has given the exceptions taken and the answers given by the court in the most explicit and satisfactory manner.

Exceptions taken and answered.

1st Exception. That the refusal of the plea in spiritual court was not traversed; *per cur'*, that is only form and surmise to bring the point in question, but not substance.

2nd Exception. The issues are immaterial; so not helped by any verdict; but *per cur'*, the true point is, whether the spiritual court hath jurisdiction or not; and if it appear they have jurisdiction, a consultation must go, though the issue be against the parson and immaterial.

3rd Exception. No verdict is found as to the contempt; so the controversy is not determined; but *per cur'*, this is no material point; the point is, whether they have jurisdiction or not; and the attachment for the contempt was only the ancient way to bring the jurisdiction in question, as on the issue in *son assault demesne*, or other actions of trespass of *vi et armis*, held not to be material, and it was said this was different, but the court did not think so.

4th Exception. Judgment was generally for a consultation, whereas the plea was only for *duæ partes*, not saying two third parts; held well, because a consultation must go according to the libel, which was for two third parts; I thought *duæ partes* in a conveyance or grant might do for two third parts, but never in pleading.

5th Exception. Because the judgment is wrong, which is *nil*

cap' per billam, and it should be *quod le defi' eat inde sine die*; but *per cur'*, it is right, because the true judgment is, that a writ of consultation be granted; and there is that judgment, besides the *vil cap' per billam*.

Sir *John Strange* has in his report of this case transmitted to us the judgment of the Lord Chief Justice Pratt, and the other judges, which goes to develop and illustrate the whole of this doctrine.

Strange's report of this case very illustrative of foregoing doctrines.

Chief Justice. The general rule laid down is certainly right; that it will be error, if the verdict does not go to all the material parts of the issue: and therefore the question is truly stated, whether this be material or not. Now as to that, consider what is the design of the parties declaring in prohibition; it is only to see, whether the court below ought to proceed further, and not whether they have proceeded; for that is a matter alledged for form sake, that there may be a demand of damages, to give it the requisites of a suit in law; but in fact we all know it is a fiction, for they never proceed after the first motion, and we must take notice of the course of proceeding: besides, if this exception should prevail, it will avoid almost every judgment in prohibition. As to the other two objections, I think there is one answer for both; that upon the whole it appears, the court below ought to proceed upon the libel, and the consultation doth not enlarge their jurisdiction. *Powys* Justice accord.

Eyre Justice. The only point in prohibition is, whether the court below shall be admitted to proceed. Formerly this was determined by a *scire facias quare non fieret breve de consultatione*, and then it lay upon the inferior court to shew they had a jurisdiction. But in case of them this method of declaring was introduced, and that puts the plaintiff to shew, that the court below has not a jurisdiction.

The consultation does not depend on the prayer of the plea, but upon the libel, and is only giving them a power to proceed upon the libel, without any regard to the pleadings upon the declaration. As to the contempt, it is merely fictitious, for does any body think we would not punish the judge if he should proceed? The case, where no venue was alledged is widely different; for there the point was tried; and if they do try it, no doubt it must be in the same manner, as all other issues are tried.

Fortescue Justice. I do not think *duas partes* are two thirds; they may as well be fifths. But the true answer is, that the libel is two thirds. And it matters not, what the party prays in his plea. In Co. Ent. there is a precedent, where the judgment is *quod fiat*

consultatio, and that the judge shall proceed *in istâ causâ*. The same answer serves for the supernumerary lands. As to the contempt, I concur with the rest; for since the precedents are both ways, we must adhere to them, which tend to support the judgment. The judgment affirmed.

Grounds of prohibition.

Various are the grounds, upon which prohibitions to the spiritual courts (I confine my enquiry to tithe causes) are granted. It has before been shewn, that the temporal court even with or without having cognizance of the matter of the libel in the spiritual court, may grant a prohibition upon the bare ground of the spiritual court's exceeding its jurisdiction. The true distinction is this *. "If the ecclesiastical judge give a wrong sentence on the "merits, where he has jurisdiction, that is only the subject matter "of appeal, and not of a prohibition. But where it appears upon "their own proceedings, that they had no jurisdiction; there pro-"hibition is the proper remedy."

Prohibitions under old statute.

In the first place a prohibition is grantable in every case, in which the ecclesiastical court interferes with or assumes cognizance of the freehold: and herein the statute and common law agree. In fact, such objects only (being within the competency of the civil magistrate) were, as before observed, transferred to the ecclesiastical forensic jurisdiction, as the legislature had upon the separation of the sheriffs and bishop's courts, confined to the latter. These were, according to Briton †, confined to wills and matrimony, and *de pure spiritualtie sans deniers prendre de lay home, ou souffers lay home jorrer devant l'ordinary*. Reference has been before made to certain canons, made by Archbishop Boniface against the laws of this realm, which were strongly contradicted by an old act of parliament entituled *prohibitio formata de statuto articuli cleri* which was made in the time of Edward I. about the beginning of his reign, which beginneth thus: *Edwardus*, &c. *Prælatis*, &c. wherein divers points are to be observed against the canons of Boniface: 1°. *Quod cognitiones placitorum super feodalibus et libertatibus feodalium, districtionibus, officiis ministrorum, executionibus contra pacem nostram factis, felonum negotiationibus, consuetudinibus secularibus, attachiamentis, vi laica malefactoribus rectatis, robberiis, arrestationibus maneriis, advocationibus ecclesiarum, sufficientibus assisis juratis recognitionibus laicum feodum contingentibus, et rebus aliis et causis pecuniarum, et de aliis catallis et debitis, quæ non sunt de testament' vel matrimon' ad coronam et dignitatem regiam pertinent,*

* *Leman* v. *Goulty*, 3 T. R. 5. *per Buller*, A. D. 1789.

† Fol. 35, 6. Reg. 36, 6, 29 Ed. 3. 29. Fitzh. N. B. 41. 2 Inst. 600.

et de regno de consuetud' ejusdem regni approbata, et hactenus observata.

2. *Et proceres, et magnates, aut alii de eodem regno temporibus nostrorum prædecessorum regum angliæ, seu nostra authoritate alicujus non consueverunt contra consuetudinem illam super hujusmodi rebus in causa trahi vel compelli ad comparendum coram quocunque judice ecclesiastico.*

Various general grounds of prohibition.

There is a very old case *, (A. D. 1224) in which a prohibition was granted, where a person was impleaded in court christian for a lay fee. Indefinite almost is the variety of causes, for which a prohibition lies in matters, that appear to concern the spiritual power, because the enjoyment thereof is a temporal benefit; as for instance, where the boundaries of a church yard come in question, or the right to a seat in a pew, the right of election to the office of a canon residentiary, right to advowson, or presentation, or to the office of a register to a bishop, &c. &c. but we confine our researches to tithes and titheable matters, and hereupon observe, that prohibitions are generally granted upon these matters on the grounds and in the cases following.

In tithe matters, 1st. ground on a modus.

First, upon a *modus decimandi*, where the defendant in the spiritual court suggests, that he and all those, whose estate he has in the lands, &c. in which, &c. have time out of mind paid so much yearly in money, or given some other recompence in satisfaction of all the tithe hay or corn, &c. This manner of tithing being by prescription, which is properly and only triable at common law, (whether pleaded in the spiritual court, or not pleaded; or whether allowed, or not allowed, there as a good plea,) is a good ground of a prohibition.

Case of *Scott* v. *Wall.*

So is the case of *Scott* v. *Wall* †, A. D. 1619. "The plaintiff had a prohibition containing, that where he had 20 acres of wheat, and had set out the 10th part of it, that the defendant pretending, that there was a custom of tithing, that the owner should have 45 sheaves, and the parson five, and so sued for that, where there was no such custom: for the court said that the *modus decimandi* must be sued for in the ecclesiastical court, as well as the very tithe, and if it be allowed between the parties, they shall proceed there; but if the custom be denied it must be tried at the common law, and if it be found for the custom, then a consultation must go; otherwise the prohibition standeth."

Farmer's case.

And herewith also agrees *Farmer's* case ‡, in the same year,

* Prynne's King John, p. 69. † Hob. 247. ‡ Ibid, 286.

1619, where a prohibition was granted out of this court in the spiritual court, upon the discharge of the payment of tithes in the hands of the abbot; upon the statute of 31 Hen. VIII. and upon issue joined, the cause was tried at the bar, by a jury of the county of Northampton, and after full evidence given, the plaintiff was nonsuited, and a writ of consultation awarded; and after the consultation, the plaintiff in this court pleaded the same plea, in discharge of payment of tithes in the court christian, which was alleged in the prohibition, which plea the spiritual judge accepted, and proceeded to try the same there; and the court was moved on the part of the said *farmer* the parson, to have a prohibition to the spiritual judge, that he should not admit of this plea, which was once tried in this court, and which merely appertained to the judges of the common law to determine, which was granted by the court; for the trial at the common law and the consultation upon it is final in this very suit, and upon that libel.

Case of *Webb* v. *Beale.*

In *Webb* v. *Beale*, A. D. 1600 *. Upon prohibition the plaintiff suggested, that he had been used from time whereof, &c. to pay 3*s.* 4*d.* for all great and † *small* tithes, except corn growing upon 70 acres of land, and made his proof by two witnesses according to the statute: but they testified, that the course was to pay 4*s.* and by the judges a prohibition was awarded; for although he have failed in the proof of his prescription, yet so much is proved; that the spiritual court has no cause to proceed for tithes in kind. *Dodderidge* said that M. 34 and 35 El. *Bird and Collingwood*, in a like case a consultation was awarded. *Popham* answered, that the opinion of the judges of C. B. is now to the contrary; for when *modus decimandi* in one sort suggested and another proved, we ought not to award a consultation to give them authority to sue for tithes in kind, but to sue for tithes in such kind as is proved ‡. If a parson sue for tithes in kind in the spiritual court, and a modus be there pleaded, which he confesses, he cannot proceed: for he ought to have sued for the modus.

The r'sing of collateral matter will not warrant a prohibition, if the spiritual court do not go on to try it.

On the other hand, if an original suit be within the jurisdiction of the spiritual court, and in the proceedings some collateral matter out of its jurisdiction be stated; unless it go on to try collateral matter, prohibition will not lie, as in *Dutens* v. *Robson* §, A. D. 1789. *Cockel*, serjeant, moved for a rule to shew cause, why a prohibition should not issue to the consistory court of the Bishop of Durham, in a suit for subtraction of tithes. The ground of his

* Cro. Eliz. 819. † The original is *nicon* perhaps for *nient*, (less,) by mistake.
‡ *Taylor* v. *Wymond*, 4 Gwil. 1576, A. D. 1634. § 1 H. Bl. 100.

motion was, that the libel stated an immemorial custom and prescription for the rector to receive from the parishioners a composition for the tithe of milk. This he urged, being matter of common law cognizance, was improper to be discussed in an ecclesiastical court, and as it appeared upon the face of the libel, afforded good ground for a prohibition.

But as the defendant had not in his plea denied the custom, the court refused to grant the prohibition. They said, that as the subject matter was within the jurisdiction of the ecclesiastical court, a prohibition would not lie, unless that court were proceeding to try the question of custom, but in this case, as the custom was not denied, it could not be put in issue. Rule refused. If the modus be not proved, as laid by the plaintiff in prohibition, the verdict must be for the defendant; but if any modus be found, though different from that laid, the court will refuse a consultation.

Thus in *Brook* v. *Richards* *, A. D. 1786. In prohibition the jury found a different modus from that laid in the declaration. And *Wood* having moved to set aside this verdict on the ground that, as this was a claim by prescription, the jury ought to have found the modus as laid in the declaration, or not at all. Case of *Brook* v. *Richards*.

Chambrè now shewed cause. The variance between the modus laid and that proved, is no ground for a new trial, or to entitle the defendant to a verdict. And issue in prohibition to try a particular modus is extremely different from issues in other suits; for whether one sort of modus or another be found, it is equally a reason to warrant the prohibition †. The very ground, on which a prohibition is prayed for, is a suggestion that the ecclesiastical court is proceeding to try a question, of which they have no cognizance. The fact, which is tried in suits in prohibition, is merely for the information of the court. This is in some respects like an issue directed by the Court of Chancery to try a particular custom, which is merely for the information of the chancellor, and which may be indorsed specially on the *postea* according to the truth of the fact. He was then stopped by the court, and *Buller*, J. said it was too clear for any other argument. The authorities cited are directly in point, as far as they go. It appears from them, that no consultation ought to be awarded; but it is equally clear, that the verdict must be entered for the defendant.

In order to try a particular modus, one party alleges, and the other denies the existence of it; that is the only issue on the re-

* 1 T. R. 427. † Dyer, 179. Hob. 192. 1 Vent. 32.

cord to be tried. As the plaintiff therefore has failed in proving the modus as alleged in pleading, the verdict must be entered specially for the defendant, who is entitled to his costs. But though the modus be not found as laid, yet if any modus be found, that is a sufficient ground for refusing a consultation.

Per curiam. The verdict must be entered specially for the defendant; and no consultation will be awarded.

Case of *Graham* v. *Potts*, to the like effect.

In Graham v. *Potts* *, A. D. 1761, upon motion for a prohibition on a suggestion, that in suit for tithes a modus had been pleaded, and it not appearing, that the plaintiff had proceeded since this plea, the court doubted, whether a prohibition would lie.

Prohibition before final sentence.

Where a modus is pleaded in an ecclesiastical court, a prohibition may be granted at any time before final sentence. A prohibition will be granted to a court of appeal, where it appears, that they have no jurisdiction over the subject matter, even after they have remitted the suit to the court below, and have awarded costs against the appellant, and though the party applying for a prohibition appeal to that court. This appears in the cases of *Darby* v. *Cosens* and *Notby* v. *Cosens* †, A. D. 1787, which being one of the most recent cases upon this point, important information will be gained by attending to what fell from *Ashurst and Buller*, in delivering their judgments.

J. Ashurst's opinion.

Ashurst, J. In my opinion, this court even in this stage of the business, must grant a prohibition to both the courts.

It is very clear, that an ecclesiastical court cannot proceed in any cause, where they have not an original jurisdiction of the subject matter; and if they do, a prohibition goes of course; or where an incidental matter intervenes, by which they are ousted of their jurisdiction, in that case also a prohibition must go. Now I take that to be the case here; for though there be no doubt, but that the ecclesiastical court have an original jurisdiction over matters of tithes, yet the instant the modus was pleaded, their jurisdiction was at an end.

It has been said, that this is only an interlocutory decree as to the insufficiency of the plea in point of form. If the sentence had proceeded on the ground of a mere matter of form, I do not say what the court would do: but here it does not appear, that this is a mere matter of form; for they judge the answer to be insufficient generally as to two of the articles. And therefore we must ex-

* 1 Blackst. Rep. 295. † 1 T. Rep. 552.

ercise our own judgment, and examine, whether on the face of the proceedings the plea appear to be insufficient. Now it does not appear to me insufficient; for the plea states, that the *modus* is in lieu of the vicarial tithes; and that is an answer to the whole charge contained in the libel. If the court below could by an interlocutory decree adjudge the answer to be insufficient generally, without assigning any reason for their opinion, it would preclude this court from granting a prohibition in any case. But this court will not suffer their hands to be tied up by such means.

With regard to the prohibition to the court of Arches; although the plaintiff might have made his application to this court sooner, I do not see, why we should not even now grant the prohibition. Costs are merely incidental to the original matter; and if we put a stop to the original suit, we must do so to all the subsequent proceedings; and matter sufficient appearing for this court to interfere and oust the ecclesiastical court of their jurisdiction, I am of opinion, that a prohibition should go to both the courts.

Buller, J. Before a party is entitled to a prohibition, it is incumbent on him to suggest, what has been done in the court below. When that suggestion is entered on record, if it state facts which are not true, the other party should move to quash it; but, if they be not impeached, the court must take them to be true. Now this case stands thus; to a suit instituted in the ecclesiastical court the party pleaded a modus, which covered the whole farm; he has pleaded it in terms, that can admit no doubt. And the only remaining question must be, as to the existence in fact of the modus pleaded; and that it was so pleaded below, is not contradicted. Then if we judge on these proceedings, they will not support the arguments used by the counsel against the rules, that both the courts below held this plea to be bad in point of form; it is not sufficient for them to say so, but they should have shewn, in what respect it was defective in form. It is not stated for what reason the courts below held the plea to be insufficient; and as the plea is stated on the suggestion, it is right in point of form. Then it appears to us, that a modus was properly pleaded to the whole libel, which ousts the ecclesiastical court of their jurisdiction; and that is the ground, on which this court will grant a prohibition. It is not necessary for the party to apply in the first instance for a prohibition; if he make an application any time before sentence, he is in time: no other line can be drawn. The argument, which the counsel against the rule have used, namely, that the only object of this application is to prevent the defendant from recovering the

J. Buller's opinion.

costs, to which he is entitled under the sentence of the court of Arches, is no objection to our granting the writ: that argument was much relied on in the case of *Whitford* against *Wilson*, in this court, E. 25 G. III. where the parties had gone to a great length in the ecclesiastical court, before they applied to this court for a prohibition; but the court there said, if the party came before sentence, it was in time. As for the case cited from *Rolle's* abridgement, in which it is said, that no prohibition lies, if there be a remedy by way of appeal, it relates only to those cases, where the suit below was proper; therefore it is not applicable here, for this is a case where, though the ecclesiastical court had originally jurisdiction; yet when the modus was pleaded, they were ousted of their jurisdiction. The prohibition is merely for the purpose of trying the modus; for the party applying must declare in prohibition, and if the jury find against the modus, I take it, a consultation goes of course. And then the ecclesiastical court will perhaps be justified in considering the costs in all the stages of the proceeding.

With respect to the other rule for a prohibition to the court of Arches, the suggestion states, that the proceedings are now depending in that court; for though a sentence have been given, yet the costs have not been paid, and they are now proceeding to compel payment of the costs. Then they are in fact proceeding in this suit. And therefore a prohibition must go to both the courts.

Both rules absolute; and the court ordered the plaintiffs to declare in prohibition.

Where variance between suggestion and libel material.

A variance between the suggestion and the libel, where the plaintiff in prohibition prescribes in *non decimando* is not material, though it be so, where he prescribes *in modo decimandi*. The reason of this difference was explicitly given in * *Hutton* v. *Barnett*, A. D. 1605, by the court of king's bench. The variance is not material here, because the plaintiff prescribes in *non decimando*, and thereby ousts the spiritual court of all manner and power of jurisdiction for any tithes arising from this grange, because it is discharged *in se*; but, if the suggestion had been on a *modus decimandi*, then it would be otherwise; for there the suit for tithes belongs originally to the spiritual court, and therefore there the suggestion ought to agree with the libel; for if the parson libel for tithe of hay, and the other will suggest a custom for tithe

* Yelv. 79.

of corn, that is not to the purpose; for it is not for the same thing. The same law, where they vary in the quantities of the thing demanded, because the suggestion is founded upon the libel, and the plaintiff is to stay the proceedings there, but for one cause certain. But in the case *supra*, the suggestion discharges the spiritual court from all manner of power for any tithes at all; and therefore the variance is not material.

Pending prohibition no suit can be in spiritual court for tithes subsequently accrued.

It must be remarked, that pending a suit in prohibition upon suggestion of a modus, there can be no suit in the spiritual court for tithes subsequently accrued, as was determined in *Linge* v. *Gunter**, 1629.

Uncertainty of the boundaries of a parish ground of prohibition.

2dly. Another usual ground of prohibition is, when the boundaries of a parish come into question, for ascertaining to which incumbent the tithes arising out of the litigated lands belong: this being matter triable by a jury on the suggestion, a prohibition will be granted †: thus in 1619 ‡, a prohibition being granted in the case of one *Wood*, upon a surmise, that the lands, whereof the tithes were demanded, lay in a different parish than that, which was supposed by the libel, *Bridgman* moved for a consultation, because the surmise was not proved within six months according to the statute of 2 and 3 E. VI. But a consultation was refused; for this being a surmise, upon which a prohibition was grantable at common law, and being a surmise upon a *modus*, not upon a *prescription* to be discharged of the payment of tithes, need not be so proved.

Whether lands dischargeable by statute, not cognisable by the spiritual court.

3dly. If lands be suggested to be discharged of tithes by the statute of 31 Hen. VIII. or any other statute, a prohibition lies, because it properly belongs to the judges of the common law to expound all statutes; and so even should the suggestion be founded on the 2 and 3 Edw. 6, for barren lands.

Prohibition lies for tithes after severance.

4thly. If a suit be in the spiritual court for the taking and carrying away of tithes after they are set forth, and divided from the nine parts, by the parishioner, (unless the suit be between two ecclesiastical persons in their own rights) a prohibition § lies, because it is a matter triable at common law.

Prohibition where spi-

5thly. If the spiritual court will not admit a legal defence, as

* 1 Gwil. from MS. Calth. 373.

† 2 Roll. Ab. 291. cites the case of *Fisher* v. *Chamberlain*, B. R. 1617, *Piper* v. *Barnaby*, 1599, B. R. and *Foster* v. *Hide*, 1616.

‡ Ward's case, Calth. MS. 372.

§ Roll. 2 Ab. 286, says, this was doubted in the case of *Leigh* v. *Wood*, B. R. 1598.

ritual court refuses to admit a plea or refuses legal proof.

a release, and accord with satisfaction, or an award, &c. or if the spiritual judge refuse to admit the defendant to traverse the plaintiff's title, as that he is not parson, vicar, &c. a prohibition will be granted. But if the defendant in the spiritual court allege such matter against the plaintiff there, which is properly triable in that court, as simony, incest, &c. in such case no prohibition will be granted *.

So where spiritual court refuses proof by one witness.

6thly, If the spiritual court shall disallow the proof of the setting forth of the tithes by one witness, a prohibition will be granted †. And so, if they deny a copy of the libel, &c.

Besides the instances, in which prohibitions are grantable, that may be reduced to some of the foregoing and general heads, many are the particular grounds, on which they will issue, not deducible to any general head. Sir Simon Degge ‡ gives the case of *Snell* v. *Bennett*, where a parson covenanted with A. his executors and assigns, that for ten shillings to him paid every year by A. his executors, or assigns, that he his executors and assigns, should be quit of the tithes of such lands during the life of the parson. A. paid the ten shillings yearly, which the parson accepted; and afterwards A. died, leaving an infant his executor; administration *durante minore ætate*, of the infant was committed to another, who leased the lands at will. The parson libelled in the spiritual court for tithes in kind of the land; and the court of king's bench, upon motion, &c. awarded a prohibition and adjudged, That the agreement and composition did bind the parson during his life. That although the assignee could not sue the parson upon the contract, yet he should have a prohibition to stay the parson's suit in the spiritual court, that the parson may have his remedy here for the ten shillings yearly, upon the contract; for that he could not have tithes in kind on account of the composition. And where the parson libels against his own agreement, that is sufficient cause for a prohibition.

Case of Snell v. Bennett.

Prohibition goes, whenever a suit is instituted for tithes of things ‖ for which none are due by law, (that is, *per legem terræ*.)

Of costs in prohibition.

It remains to consider, how the parties suing or sued in prohibition are affected with costs ¶. The 2d and 3d Edw. VI. c. 13. s.

* 2 Roll. Abr. 302. † 2 Ib. 300. in *Downs* v. *Devenish*, 1620. *Mallary* v. *Marriott*, Cro. El. 666. A. D. 1599, and anon. Moor, 909. ‡ Parson's Law, 252. § Rol. Rep. *Snell* v. *Bennett*, 327, A. D. 1624. and more fully by *Palmer*. ‖ Com. Ab. Tit. *Prohibition*, refers to 1 Roll. Rep. 379. which is the case of *Pitt* v. *Harris*, A. D. 1617, where prohibition was granted to stay a suit for *rakings*, in which *Coke* said, *que il ne like tel greediness*, 1 Roll. Ab. 635, and *Selden Hist. T.* c. 14. 33. ¶ Shaw on Tithes, 529.

14. gives costs, (as before observed,) where the party applying for a prohibition fails in proving the truth of his suggestion within six months; and this continued to be the only case, where either the plaintiff or defendant in prohibition was entitled to recover any costs, until the * 8th and 9th W. III. c. 11. s. 13. in all actions of waste, debt for not setting out tithe, where the single value found by the jury does not exceed twenty nobles; and in a *scire facias*, and suits upon prohibition, the plaintiff shall recover his costs; and if the plaintiff be nonsuited, or discontinue, or a verdict pass against him, the defendant shall recover his costs.

Note ‡, costs in prohibition shall be taxed from the suggestion, so as to take in the costs of the motion. The statute extends only to cases after plea pleaded or demurrer joined; but if there be judgment by default, and the plaintiff have damages on a writ of enquiry for the contempt in proceeding after the prohibition delivered, which is confessed by the default, he will be entitled to costs at common law. However, as this part of the declaration is no more than form, costs are allowed only from the time of the rule for a prohibition.

The court, after judgment for the plaintiff in the case of *Sir Henry Houghton* v. *Starkey* §, were of opinion, that the costs ought to be allowed from the time of the first motion, and directed all the officers for the future to allow the costs of the first motion. And in *Sweetnam* v. *Archer's* case ‖, it was stated in the same manner, and agreed to be the uniform practice ever since. In *Sir Thomas Bury* v. *Cross*, the same doubt was raised by a new master, and the court ordered costs from the original motion.

Costs by the statute 8 and 9 W. III.

In the before mentioned case of *Middleton* v. *Croft*, the plaintiff in prohibition having prevailed in one point, although he failed in all the rest, moved for costs; and it was moved, that they might be taxed from the time of the first motion, according to several determinations. And this last was acquiesced in, if the court should be of opinion for costs; as to which it was objected, that the point, in which the plaintiff prevailed was not the gist of the proceedings, but only a circumstance; and that it would be very hard, that they who had prevailed upon the merits should pay costs. But by the court, the words of the act are not to be gotten

* Viz. an act for better preventing frivolous and vexatious suits.

‡ *Wills* v. *Turner*, Hil. A. D. 1716, C. B. *Sir L. Bettison* v. *Dr. Hinchman*, M. A. D. 1715, C. B. § Stra. 82. A. D. 1719. ‖ Ib. A. D. 1726. Str. 83. A. D. 1727.

over, which gives costs to the plaintiff if he obtain any judgment. And this matter was under consideration in the house of lords in Dr. *Bentley*'s case, where the prohibition stood as to some articles, and there was a consultation for the rest: "To be sure it will be "considered in the quantum, but we cannot deny costs."

Dr. Bentley's case.

In *Dr. Bentley and the Bishop of Ely*'s case *, and in the argument of this case the whole court were clearly of opinion, that where a prohibition goes to part, and a consultation to the other part, the plaintiff in prohibition is entitled to costs. And Lord Hardwicke, then Chief Justice, observed that this case was within the very words of the statute of 8 and 9 W. III. c. 11. s. 3. which are, "if the plaintiff obtain judgment or any award of exe- "cution after plea pleaded, or demurrer joined," and the statute only proved for the defendant's recovering his costs in such suits, where the plaintiff should become nonsuit, suffer a discontinuance, or a verdict pass against him, none of which was the case here. And as to the *quantum* of the costs, that though it were an equitable construction of the statute to give costs from the first motion, yet where a consultation was awarded as to part, it was in the discretion of the court, upon the circumstances of the case, whether they would allow costs from that time or not.

Costs of motion in prohibition.

In the case of *Gegge* v. *Jones* †, upon shewing cause against a prohibition, the court made the rule absolute, with a direction that the plaintiff should declare in prohibition. The plaintiff tendered a declaration, but the defendant refused it, and applied to stay proceedings, as being unwilling to submit. The other insisted he had a right to go on, and so get the costs of the motion, which he could not otherwise have. But the court stayed the proceedings without costs, saying the direction to declare was in favor of the defendant, who might waive it.

Costs of nugatory pleas.

But if defendant in prohibition compel the plaintiff to declare, and then plead a nugatory plea, the court will, on motion, order him to pay the costs to the plaintiff. As in the case of *Seed* v. *Woolfenden* ‡, at the defendant's instance it was made part of the rule for a prohibition, that the plaintiff should declare in prohibition. The defendants afterwards demanded a declaration, and threatened a *non pros.* for want thereof. The plaintiff's agent prepared a declaration, but when it was ready, he was told by the defendant's agent, that he need not deliver it; however, having been

* 2 Bro. P. C. 220, A. D. 1734.
† Str. 1149, A. D. 1741.
‡ Barnes, 148, A. D. 1756.

at the trouble and expence of preparing it, he delivered it, and demanded a plea. The defendant pleaded nothing to the merits, but only that he did not proceed in the spiritual court after the prohibition, gave a rule to reply, and demanded a replication. Upon which the plaintiff obtained a rule for the defendant to shew cause, why he should not pay the plaintiff the costs of the proceedings in prohibition. The rule was now made absolute. The court looked upon the plea to be a sham nugatory plea, not being to the merits of the cause; the allegation, that the defendant had proceeded contrary to the prohibition is, and must be, put into every declaration of this kind; but whether he have so proceeded or not, is totally immaterial.

A plaintiff in prohibition is only entitled to costs by the statute of 8 and 9 W. III. c. 11. where he obtains judgment after the plea pleaded or demurrer joined; but if there be judgment by default in a suit in prohibition, and the plaintiff have damages upon a writ of inquiry, for the contempt in proceeding after the writ of prohibition, he will be entitled to costs by virtue of the statute of *Gloucester*, c. 1.

Costs awarded on judgment by default.

And in the case of Sir *E. Bettinson* v. *Dr. Hinchman* *, upon a motion to set aside a writ of enquiry of damages in prohibition after judgment by default, upon which the jury had found damages for the plaintiff, it was alleged on the part of the plaintiff, that the citing him to appear in the spiritual court in a plea, of which that court has no cognizance, and whereby the plaintiff may sustain great damages, is a contempt of the laws of the land, and therefore the defendant ought to make the plaintiff satisfaction for the damages sustained by the proceedings in the court below; and this the defendant tacitly admits, by suffering judgment to go against him by default. And if the plaintiff be entitled to damages, he is also to costs, under the statute of *Gloucester*, c. 1.

The court inclined to be of this opinion, but took further time to consider of the matter. On a subsequent day the question was solemnly argued: after which the court gave the plaintiff leave to proceed in his enquiry, and directed the prothonotary to tax his costs. But because in this case the defendant was prosecuted for a contempt at common law, as judge of the spiritual court, he could not possibly be in contempt, until the rule was made absolute to stay his proceedings; the costs were allowed only from the time, that the rule for the prohibition was made absolute.

* Referred to before, Bul. N. P. 331. and *Bettinson* v. *Savage*, Com. Rep. 335, A. D. 1721.

Administrator nonsuited shall not pay costs.

If in a suit in prohibition the plaintiff be obliged to declare as administrator, (as, if the prohibition be granted to a suit in the spiritual court against the plaintiff as administrator, for tithes due in the intestate's life-time,) and become nonsuit at the trial, he is not liable to payment of costs.

Defendant on nonsuit of plaintiff only entitled to costs of nonsuit, not for opposing the rule for the prohibition.

A defendant in prohibition, in case of the nonsuit of plaintiff, is not entitled to the costs occasioned by opposing the rule for the prohibition, but merely to the costs of the nonsuit, as was determined in the case of *Carlisle* v. *Meyrick* *, upon a rule to shew cause, why the prothonotary should not review his taxation of costs, it appeared that the plaintiff in a suit in prohibition had been nonsuited; upon which the question was, whether the defendant ought to have the costs incurred by opposing the rule to shew cause, why the writ of prohibition should not be granted, as well as the costs of the nonsuit? It was determined, that he ought to have no more than the costs of the nonsuit. If the defendant had succeeded in his opposition to the rule to shew cause, why the prohibition should not be granted, it would even then have been for the consideration of the court, whether upon all the circumstances of the case, that rule should be discharged with costs; but as he did not succeed in that opposition, it must now be intended, that it was groundless, and consequently there is no pretence for his being allowed the costs thereof.

Even a partial verdict in prohibition carries costs.

In the case of *Malton qui tam* v. *Achlam* †, it was holden that a defendant in a suit in prohibition is entitled to costs where a verdict is found for him, though it be for part only of the matter in issue.

Having gone through this most general head of common law proceedings upon tithes, which is that of prohibition, we come orderly to the consideration of other actions, which may be prosecuted for the payment, recovery, or establishment of tithes or compositions for tithes at common law, or upon particular statutes. It follows from what has been before observed, that in every case, in which the subject has not his remedy concerning tithes in the spiritual court, it lies for him in the temporal courts, (provided it be not a peculiar case for equity) in which he will find redress by action of *trespass*, *debt*, *case*, &c. as the circumstances of the case shall warrant. The great bulk of cases relative to tithes, which go to juries, arises out of feigned actions to try rights, or of issues directed by the courts of equity to try questions upon mo-

* A. D. 1777, Say on Costs, 137. J. † A. D. 1749, Bara. 138.

dues, compositions and other points, which ecclesiastical courts, and courts of equity, are incompetent to decide, as being matters to be tried only by a jury. No particular observations bear upon suits of this nature relative to tithes, which apply not generally to actions upon indifferent subjects.

Consolidation of suits.

It must frequently happen, that many parishioners under similar circumstances are parties to the suits: the courts of law will (I presume) permit, in their discretion, on motion, a consolidation of the suits, as is done in courts of equity. In 1791, in *Pyke* v. *Brock* *, on motion to consolidate seven tithe suits, where there were several bills filed against seven different defendants, Lord C. Baron *Eyre* said, that the court always required an affidavit, that the defendants do not defend by common subscription. In that case no cause was shewn, and the rule was made absolute.

Particular customs not established without trial at law.

Particular customs never are established without a trial at law, unless the defendant waive an issue, which is in fact an abandonment of his right. In 1779, in the exchequer †, there was a bill to establish a custom of tithing. The defendants denied the custom, but acknowledged, that they had titheable matters, which were unpaid if due in kind. The counsel for the plaintiff stated, that the evidence was so strong as not to bear controversy. But the court said, that customs never were *established* without trial at law, where the defendant denied the custom, unless the defendant should waive an issue tendered. And this was admitted to be the practice on all hands. It is not however an universal rule, that a court of equity shall in all cases of moduses and customs refer it to a jury, as in the case of *Morgan* v. *Neville* ‡, in Scac. 1773, the rector filed his bill for the tithe of milk being carried to the church porch for the use of the parson, and the custom was established without sending it to a jury. Lord *Mansfield* observed, when the before-mentioned great case of *Travis* v. *Oxton* was before the lords, that where the question is on a mere legal right, a court of equity ought not to determine it without an issue, unless it be clear beyond contradiction, and without a possibility of its being otherwise. Nor can a court of equity in any instance direct an issue upon customs, which are not stated with precision; as in a modus for agistment tithe, the time to be covered by it must be shewn, as was determined in *Warren* v. *Fisher* §, in the exchequer, 1785. Yet, however, a court of equity seemed to

* 4 Gwil. MS. 1345. † *Robinson* v. *Barrow*, in Scac. 3 Gwil. MS. 1173.
‡ 3 Gwil. 1046, Eyre's MS. § 4 Gwil. MS. 1269.

think, that although a modus be not proved as laid, yet if the court have well founded reason to think, that some modus does exist, they will direct an issue to try it *. But where a different modus is proved from that laid in the bill, a court of equity will not direct an issue, where the parson resists it. † In the case of *Dr. Scott* v. *Fenwick and others*, 1783, these 2 points were ruled, viz. that an issue cannot be directed, where the evidence shews a different modus than that alleged; and where a modus is alleged generally and without restriction, the court cannot direct an issue to try a modus with a restriction.

In tithes, the neglect of an incumbent to insist upon his rights does not conclude his successors.

Although the two following cases might with more propriety be referred to the next chapter, in order to take a more complete view of the instances, in which issues may be directed, it is very important to remark, that a person is not shut out of redress, merely because it might have been granted, but was neglected or omitted to be granted by the court on a former application. As in *Collins* v. *Sir Henry Gough* ‡, 1785, before the lords, it was determined, that the court was not concluded from directing an issue to try a modus by a decree in a former cause, in which the very same modus was insisted upon; no issue having been directed in the first cause: and in the before-mentioned cause of *Gwavas* v. *Kellynack*, an issue was directed to try the customary payment of tithe fish, although the defendants gave no evidence against the custom, and though a decree in a former cause on the same custom had been acquiesced in for many years. When an issue is directed to try the existence of a right, and the jury find a different right from that alleged in the pleadings, without a special order for that purpose, the judge may notwithstanding indorse the right so found on the *postea*.

General nature of evidence.

These general observations on issues directed to be tried by courts of law, naturally lead our attention to the nature of the evidence, by which they are to be proved: for it mainly interests all persons, who may become involved in suits for tithes, to be well apprized of the nature, means, and grounds of the evidence, by which their claims may be resisted or supported. This head of research is the more important, as the general grounds of evidence will apply not only to what may be offered at trials in our common law courts, but also to examiners and commissioners of courts of equity,

* 2 Gwil. 745, Joddrell's MS. 1737, dictum in *Williams* v. *Cullum*, and *Elias* v. *Dormer*, 3 Atk. 534. 1747. See also *Laithes and others* v. *Christian*, Ibid, 740.

† *Bishop* v. *Chichester*, 4 Gwil. 1325. Cox's MS. 1787. 3 Gwil. 1252. Sky. MS. ‡ 4 Gwil. 1299. 2Br. P. C. 446.

and ecclesiastical courts. For our purpose it will suffice to divide the subject into written and unwritten testimony: the effects of which shall be successively considered.

Divisions of evidence.

Public and private.

Of record, and of an inferior nature.

* Written evidence is twofold, *public* and *private*: and these two sorts subdivide themselves into matter of record, and matter of *inferior nature*. † Records are the memorials of the legislature, and of the king's courts of justice, and are authentic beyond all manner of contradiction: they are (if a man may be permitted a simile from another science) the proper diagrams for the demonstration of right, and they do constantly preserve the memory of the matter, that it is ever permanent and obvious to the view, and to be seen at any time in all the certainty of demonstration, inasmuch as the record can never be proved *per notiora*; for a demonstration is only appealing to a man's own conceptions, which can never be done with more conviction, than where you draw the consequence, for what is already *concessum*, and consequently there can be no greater demonstration in a court of justice, than to appeal to its own transactions.

But records, being the precedents of the demonstrations of justice, to which every man has a common-right to have recourse, cannot be transferred from place to place, to serve a private purpose; and therefore they have a common repository, from whence they ought not to be removed but by the authority of some other court. This is plainly agreeable to reason and justice: for if one man might demand a record to serve his own occasions, by the same reason any other person might demand it; but both could not possibly possess it at the same time in different places, and therefore it must be kept in one certain place in common for them both: besides these records, by being daily removed, would be in great danger of being lost, and consequently it is on all hands convenient, that these monuments of justice should be fixed in a certain place, and that they should not be transferred from thence, but by public authority from superior justice.

Copies of records taken as evidence.

‡ The copies of records must be allowed in evidence, for since you cannot have the original, the best evidence, that can be had of

* Gilbert's Ev. 6. &c. † Ib. 36.

‡ 10 Co. 92, 93. Ch. Rep. 15. Co. Lit. 225. a. b. 226. a. 227. b. Cro. Car. 209, 441, 442. Cro. Jac. 70, 103, 109, 292, 317, 360. Bulst. 154, 155. Pl. Com. 80. a. 85. a. 148. b. 222. a. Dy. 29 pl. 199. 200. a. 5 Co. 75. a. Palm. 87. Rol. Rep. 332. 2 Rol. Rep. 172, 191. Mod. Rep. 266. Doct. Pl. 215. Saund. 9, 10. Mod. 8. 42, 43, 74. 108, 109, 126, 292, 507, &c. 515, &c. 518. 12 Mod. 3, 24. 394, 414, 494, 500. 579. 8 Mod. 75, 322. 9 Mod. 66. 2 Vern. 471, 591, 603. Ch. Pr. 166,

them is a true copy; and the rule of evidence commands no farther, than to produce the best, that the nature of the thing is capable of: for to tie men up to the original, that is fixed to a place, and cannot be had, is totally to discard their evidence; but it were very hard and injurious to remove from evidence the best and most authentic testimony, because it is so guarded and confined by the law, that it cannot be had or produced itself: for then the rules of law and right would be the authors of injury, which is the highest absurdity: for, in many cases, justice must fail without proof from the records, when themselves cannot be had at the trial.

Copy of a copy no evidence.

* But a copy of a copy is no evidence; for the rule demands the best evidence, that the nature of the thing admits, and a copy of a copy cannot be the best evidence, for the farther off a thing lies from the first original truth, so much the weaker must the evidence be, and therefore they must give a true copy in evidence, which is to reduce it to its first and best certainty. Besides where you will give the copy of a copy in evidence, there must be a chasm or gap in your evidence: for if you have the first copy, and by oath or otherwise prove that a true copy, then the second copy is altogether idle and insignificant; if you have only the second copy, then it cannot appear, that the first was a true copy, because it is not there to be sworn to, and by consequence it is not proved in court, and there it is no evidence, and consequently the transcript of that, which is in itself not evidence, cannot be evidence.

Acts of parliament.

The first sort of records are acts of parliament; these are the memorials of the legislature, and therefore are the highest and most absolute proof; and they either relate to the kingdom in general, and then are called general acts of parliament, or only to the concerns of private persons, and are then called private acts.

General and private acts of parliament.

Printed acts allowed to be evidence.

† Of general acts of parliament, the printed statute book is evidence; not that the printed statutes are the perfect and authentic copies of the records themselves, for there is no absolute assurance of their exactness, but every person is supposed to apprehend and know the law, which he is bound to observe, and therefore the

Eq. Abr. 228. Lord Raym. 763, 967, 1126, 1536. Stra. 401. 526, 2 Stra. 1122. 1186. 1198. 1241. State Trials 44. Langhorn's Trial. 3 Lev. 387, 388. 8 Geo. c. 25. s. 2.

* 2 Bac. Abr. 308. Skin. 174, 584. by statute 20 Geo. II. c. 24. s. 14. Copies of letters of attorney, &c. relating to prize-money, &c. made evidence.

† 2 Salk. 566. 10 Mod. 216, 126, 181. Keb. 2. Jenk. Cent. 280. pl. 5. Hale's Hist. of the Common Law, 25, 16. Styl. 462. Stra. 446. 3 R. S. L. 90.

printed statutes are allowed to be evidence, because they are the hints to that, which is supposed to be lodged in every man's mind already.

In private acts of parliament the printed statute book is not evidence, though reduced into the same volume with the general statutes, but the party ought to have a copy compared with the parliament roll: for private statutes do not concern the kingdom in general, and therefore no man is understood to be possessed of them, as they are of those general laws, which are set up as the regulation of their own actions, and consequently the private statutes are no intimation to what is already known, but they are the rules and degrees that relate to the private fortune of this or that particular man, which no one else is under any obligation to understand or take notice of, and therefore they ought to be proved with the same punctuality as the copies of all other records, for they are not considered as already lodged in the minds of the people. Printed private acts not so.

* It has been the opinion of many, that the copy of private acts allowed to be evidence, ought to be under the great seal. Exemplifications of records.

Copies of records are either under seal or not under seal. Those under † seal are called *exemplifications*, and are of better credit than any sworn copy: for the courts of justice, that put their seals to the copy, are supposed more capable to examine, and more exact and critical in their examinations, than any other person is or can be; and besides, there is more credit to be given to their seal, than to the testimony of any private person; and therefore we are more sure of a fair and perfect copy, when it comes attested under their seals, than if it were a copy sworn to by any private person whatsoever. These exemplifications are either under the broad seal, or under ‡ the seal of the particular court. Those under the broad seal are of themselves records of the greatest validity, and to which the jury ought to give credit, under the penalty of an attaint §; for there is more faith due to the most solemn attestations of public authority, than any other transactions whatever; and therefore a falsification in this case is high treason.

Copies under the seal of a particular court are of higher credit than a sworn copy, for the reasons formerly given.

§ These exemplifications, and all other under seal, shall be delivered to the jury to be carried off with them, but sworn copies Exemplifications carried away

* 10 Mod. 126. Dy. 239. 3. R. S. L. 91.
† 10 Mod. 125, 126.
‡ Sid. 145, 146. Hard. 118. Pl. Com. 411. a. Pl. Com. 411, 2.
§ Sid. 145. Hard. 118.

with the jury.

shall not: because these things, that are generally of higher or at least of equal credit with matters sworn *vivâ voce*, would not yet be understood so well upon the hearing, as the evidence *vivâ voce* may upon the examination, where the jury have liberty to put what question they please: and therefore matters under seal are carried away by the jury, to be seen and considered, that things of greater credit may be equally understood with other matters, that carry less authority.

Things under seal are supposed to have an intrinsic credit from the impression of the signature, and are supposed to be known by the jury in some measure, and therefore are very conveniently lodged in their possession for them to form their minds upon; but of writings that are not under seal, the jury can make no judgment of their own, but their credit must totally arise from some act in court, and therefore they cannot be put in the power of the jury. Thus * seals of public credit are full evidence in themselves without any oath made, but seals of private credit are no evidence, but by an oath concurring to their credibility. Seals of public credit are the seals of the king, and of the public courts of justice, time out of mind. Now these courts make a part of the law and the constitution of the kingdom, and have their sanction in that immemorial usage, that is the foundation of the common law.

Seals of public and private credit.

Private seals must be sworn to.

The seals of private courts, or of private persons, are not full evidence by themselves without an oath concurring to their credibility; for it is not possible to suppose these seals to be universally known, and consequently they ought to be attested by something else, that is, by the oath of some one, who has knowledge of them. For what is not of itself known, must be made known *aliundè*; and when the seals are thus attested, they ought to be delivered in to the jury, because though part of their credit arise from the oath that gives an account of their sealing, yet another part of their credit arises from a distinction of their own impression. For anciently every family had its own proper seal, as it is now in corporations; and by this they distinguished their manner of contracting one from the other, and by false impressions of the seals they discovered a counterfeit contract, and therefore it was not the oath, but the impression of the seal accompanying it, that made up the compleat credit of the instrument.

* Sid. 146. Hard. 118, 119. Pl. Com. 411. a. A commission under the *Exchequer* seal, (though a commission of instruction only, and not of intitling) is admissible in evidence, though not conclusive, Bur. Rep. 147. Say Rep. 298.

But since in all private contracts the distinction of sealing is worn out of use, and men usually seal with any impression, that comes to hand, there must be evidence of putting the seal, because at this day little can be discovered from the bare impression; besides, since the witnesses names are inserted in the contract, unless they appear to prove the contract, there is not the uttermost evidence that the nature of the thing is capable of, for their not appearing, is a presumption, that they were never privy to any such transaction.

What exemplifications shall be delivered to the jury.

* Exemplifications of depositions in equity, shall be delivered to the jury, if the party be dead, and these exemplifications are under the great seal; but if the exemplification comprehend the testimony of some, that are living, and of others that are dead, it shall not be delivered to the jury, because, when the parties are dead, their depositions are the greatest evidence, that the nature of the thing is capable of, and equal to evidence *vivâ voce*, and ought to be as carefully considered and examined, which cannot easily be, unless carried away by the jury, for the bare reading of them in court is not likely to make the same impression: besides this evidence does not derive any credibility from any act of the *Nisi Prius* court, but they have it intrinsically in themselves, from the self-evidence of their own seals †; and therefore, wherever they are removed, they remain the same, but if some of the witnesses be living, it is not the highest evidence.

Sworn and office copies.

The second sort of copies are those not under seal; and these are sworn copies or office copies. Sworn copies must be of the records brought into court in parchment, and not of a judgment in paper, signed by the master, though upon such judgment you may take out execution, for it does not become a permanent matter, till it be delivered into court, and there fixed as memorandums or rolls of that court; and untill it be a roll of that court, it is transferrable any where, and so comes not under the reason of law, which permits us to give a copy in evidence.

Copy of record may be read when the record is lost.

‡ Where a record is lost, a copy of it may be read without swearing a true copy, for the record is in the custody of the law, and not of the party; and therefore, if lost, there ought to be no injury arising to the party's private right; and consequently, if it be lost, the copy must be admitted without swearing any examination concerning it, since there is nothing, with which the copy can

* 2 Rol. Ab. 687. Styl. Prac. Reg. 294. † 2 Stra. 920. Barn. K. B. 348.
‡ Vent. 257. Styl. Prac. Reg. 2, 5. Mod. 117. Salk. 285.

be compared, and therefore it must be presumed true without examination.

* But in such cases as these, the instruments must be according to the rules required by the civil law: they must be *vetustate temporis, judiciariâ cognitione roborata* †.

‡ So the copy of the decree of tithes in *London*, has been often given in evidence, without proving it a true copy, because the original is lost.

Whole and not partial copies of records to be given in evidence.

When a man gives in evidence the sworn copy of a record, he must give the whole copy of the record in evidence, for the precedent and subsequent words and sentence may vary the whole sense and import of the thing produced, and give it quite another face; and therefore so much at least ought to be produced as concerns the matter in question.

Office copies examined by proper officers, and not.

As to office copies given in evidence, there is a difference to be taken between a copy authenticated by a person trusted to that purpose, for there that copy is evidence, and a copy given out by the officer of the court, not specially trusted to that purpose, is not evidence, without proving it actually examined.

The reason of the difference is, that where the law has appointed any person for any purpose, the law must trust him as far as he acts under the authority which the law has lodged in him; otherwise it would be to give credit to a person duly authorized, and to one not authorized at all at the same time.

Chirograph of a fine evidence.

Therefore the chirograph of a fine is evidence to all persons of such a fine, for the chirographer is appointed to give out copies between the parties of those agreements, that are lodged of record, and therefore his copy must be admitted as evidence without further dispute.

So is the endorsement of an enrolled deed.

§ So where a deed is inrolled, the indorsement of that inrollment is evident, without further proof of the deed, because the officer is entrusted to authenticate such deeds by inrollment, and when such officer indorses that he has done it pursuant to the law, then the law, which entrusted him with the authority of doing it, ought to give credit to what he has done.

But when an officer of the court, who is not entrusted to that purpose, makes out a copy, they ought to prove it examined; the reason is, because being no part of his office, he is but a private

* Com. Dig. 292. Mod. 117. † *Corroborated by length of time, or judiciary cognizance.*
‡ Vent. 257. § See 10 An. c. 18. and 8 Geo. II. c. 6 sect. 21.

man, and a private man's mere writing or word ought not to be credited without his oath.

Therefore, it is not enough to give in evidence a copy of a judgment, though it be indorsed to have been examined by the clerk of the treasury, because it is not part of the necessary office of such clerk; for he is only entrusted to keep the records, for the benefit of all men's perusal, and not to make out copies of them.

Those only can authenticate, who have a special official duty so to do.

So if the deed inrolled be lost, and the clerk of the assize make out a copy of the inrollment only, this is no evidence, without proving it examined, because the clerk is entrusted to authenticate the deed itself by inrollment, and not to give out copies of the inrollment of that deed.

But the office copies of depositions are evidence in *Chancery*, but not at common law, without examination with the roll; for the court of *Chancery* have for convenience allowed their office copies to be evidence in their own court, and have empowered their officers to make out such copies, as should be evidence, but the particular rules of their court are not taken notice of by the courts of common law.

Office copies of depositions in Chancery, are evidence there, but not in other courts.

When the record is pleaded, and appears in the allegations, it must be tried on the issue *nul tiel record*; but where the issue is upon fact, the record may be given in evidence to support that fact.

Plea *nul tiel record.*

When the issue is *nul tiel record*, the record must be brought *sub pede sigilli*, but where the record is offered to a jury, any of the forementioned copies are evidence.

But out of this rule there is an exception, that where the record is inducement, and not the gist of the action, there it is not of itself traversable, but must be given in evidence on the proof of the action, for nothing can be of itself traversable, that does not make a full end of the matter in question.

When record not traversable.

When any person produces a record, it must be so much at least as concerns the matter in question, for it is no evidence, unless you shew the whole import of the matter, for the preceding or following words may give it quite another face*.

Records must be shewn forth *in toto.*

So was the case of the vicar of *Rohuend*, by the opinion of Justice *Dodderidge* †. An ancient verdict in prohibition, where the custom of tithing was set out, whether it might be given in evi-

Evidence of ancient custom.

* The record of a conviction in a *civil* cause cannot be given in evidence on a criminal prosecution, by *Hardwicke*, Ch. J. as a principle of law. *Ca. temp. Hardw.* 312.

† *Gilb.* 36.

dence against another parishioner, that was not party to the verdict, nor had the lands in question; and holden by some, that it might be given in evidence, because it could not be supposed to have been a contrivance to alter the custom, because it appeared to be ancient, and therefore, there could be no other proofs but of this sort, of what was then thought to be the custom.

Bill in equity evidence against a complainant.

A bill in equity is evidence against the complainant, for the allegations of every man's bill shall be supposed to be true; nor shall it be supposed to be preferred by the counsel or sollicitor, without the party's privity, and therefore is evidence as to the confession and admittance of the truth of any fact, by the party himself; and if the counsel have mingled in it what is not true, the party may have his action. So if a* patron sue a simoniacal bond, and the person prefer a bill in chancery to be relieved, the bill and proceedings upon it shall be given in evidence on ejectment, to make void the parson's living.

So is the answer against a defendant.

And if the bill be evidence against the complainant, much more is the answer against the defendant, and carries still higher weight of probability along with it, because this is delivered in upon oath, and therefore over and above the single confession, it has an authority from the sanction of an oath.

Answer not to be read partially.

But when you read an answer, the confession must be all taken together, and you shall not take only what makes against him, and leave out what makes for him; for the answer is read as the sense of the party himself, and if it be to be taken in this manner, you must take it entire and unbroken.

When affidavits are sworn to, the circumstances under which they were sworn, must be proved.

Analogous to this is a man's own voluntary affidavit, which may also be given in evidence against him: but then the proceedings must regularly be given in evidence, on which this affidavit was made, and the reason why the proceedings must also be given in evidence, is to prove the identity of the person, for to prove an affidavit sworn is not sufficient, for it may be sworn by fraud and contrivance, the person being personated by somebody else, and therefore to bring home the proof to the person, you must prove the occasion of the swearing, for it is not to be thought, that any man without some occasion or other would make a plain affidavit.

When answer sworn to, bill should be produced, unless lost or mislaid.

There is a very great difference between the evidence of an answer, and that of a voluntary affidavit. An answer cannot be given in evidence without producing the bill, because without the bill there does not appear to be a cause depending; but if there be

* Keb. Rep. 780. 2 Sid. 221.

proof by the proper officer, that the bill has been searched for diligently in the office, and cannot be found, there the answer has been allowed to be read without a sight of the bill; and this Lord Chancellor *Broderick* allowed, though the loss of the bill were not proved by the proper officer, but by the clerk only, who wrote in the office, and swore he searched carefully with the officer, and could not find the bill.

An answer is proved by shewing the allegations in court, viz. by shewing the bill, which is the charge, and the answer which is, as it were, the defence to the bill; and this in *civil* cases shall be intended to be sworn, because the proceedings upon such defence are upon oath: now since the proceedings of any court of judicature within the kingdom are good evidence in other courts, and the proceedings in this case are upon oath, it follows of consequence, that in all civil cases, the answer is to be taken as an oath, without any further proof but from the proceedings in the cause.

Voluntary affidavits must be proved to have been sworn.

But a voluntary affidavit is not part of any cause in a court of justice, and therefore, it must be proved to be sworn; for if you only prove it signed by the party, the proof goes no farther than to suppose it as a note or letter, and as such, you may not give it in evidence, without more proof; for a note or letter is a bare acknowledgement under the hand of the party, and this is no more, unless you prove it to be sworn also, for it cannot be presumed to be sworn, being not filed as an oath in a court of justice.

Difference between written depositions and *vivâ voce* evidence.

As every incumbent is entitled by common law to demand his tithes in kind, and to throw the burthen of proving a modus, exemption, &c. on his parishioners, it is obvious, that in tithe causes, above all other causes, it may be necessary to resort to former proceedings upon the same subject; and it therefore becomes frequently necessary to revive the testimony of former witnesses, as to the payment or non-payment of moduses and other such like matter, that must necessarily arise in renovated suits upon decimal subjects. In the eyes of Englishmen, the trial by jury is preferable to the examination of the civil law, when under the best regulation. And no doubt in our chancery proceedings, the witnesses were formerly examined by the masters, who sat in the court, to inform the chancery of their credibility, until causes so multiplied, that the masters were employed in other affairs, and so the examination of witnesses was left to the examiners. Now, since this practice has been used, no doubt, but that the credit of depositions *cæteris paribus* falls much below the credibility of a present examination *vivâ voce*, for

the examiners and commissioners in such cases, do often dress up secret examinations, and set up a quite different air upon them, from what they would seem, if the same testimony had been plainly delivered under the strict and open examination of the judge at the assizes. But though the depositions do fall short of examinations *vivâ voce*, yet they seem superior to what a witness said at a former trial; for what is reduced to writing by an officer sworn to that purpose, from the very mouth of the witness, is of more credit, than what a stander-by retains in memory of the same oath; for the images of things decay in the memory, by the perpetual change of appearances; but what is reduced to writing continues constantly the same; so that we cannot be certain on a verbal attestation; but that some circumstances of the fact may be lost in the recollection. We must in the next place see in what cases depositions may be read.

* 1st. They may be read, where the witnesses are dead; for where the witness is living, they are not the best evidence the nature of the thing is capable of, and therefore cannot be read; but where the witness is dead, the deposition is allowable: for as records are the invention, that perpetuate the decisions of law, so are depositions the only method to perpetuate the memory of the fact, and therefore they must be trusted, where the witness is not in being.

Evidence in absence of a witness.

2dly. Where a witness is sought and cannot be found, you may upon oath of the matter use his depositions; for when it appears by oath, that he cannot be found, it is the best evidence, that possibly can be had of the matter; for when a witness is sought and cannot be found, he is in the same circumstances, as to the party that is to use him, as if he were dead.

Depositions of a sick witness.

3dly. If it be proved, that a witness was subpœnaed and fell sick by the way, his deposition may be allowed to be read, for in this case the deposition is the best evidence, that possibly can be had, and that answers what the law requires.

Chancery admits depositions in a cause relating to the same lands.

But depositions taken 30 years since, were admitted to be read in chancery, though the parties were not the same, inasmuch as the cause related to the same land, and the terre tenants were parties to it, and those witnesses are since dead, the plaintiff's title then not appearing. And this is an indulgence of the chancery, beyond

* Godb. 193, 326. 2 Stra. 920. Barn. B. R. 348. 2 Bac. Ab. 305. Gilb. Chan. 140. Salk. 278, 281, 286. 4 Mod. 146, s. c. Show. 363. 2 Salk. 555, 691. T. Raym. 170. Hob. 112. 2 Rol. Rep. 679. Hard. 232, 315. T. Raym. 335, 336. Lil. Abr. 388, 554. 5 Mod. 9, 163, 277. 1 Atk. Rep. 445.

the strict rules of the common law, and is admitted from pure necessity, in order that evidence should not be lost; besides, chancery has great faith in its own examiners, who are supposed indifferent persons, that do by themselves take the sense of the parties so strictly, that thereby the depositions stand the fairer to be read at any time.

No deposition against a person not party to the suit.

4thly. A deposition cannot be given in evidence against any person, who was not party to the suit, and the reason is, because he had not liberty to cross-examine the witnesses, and it is against natural justice, that a man should be concluded in a cause, to which he never was a party.

Nor shall advantage be taken of depositions by one not party to the suit.

5thly. A man shall never take advantage of a deposition, that was not party to the suit: for if he cannot be prejudiced by the deposition, he shall never receive any advantage from it, for this would create the greatest mischief that could be; for then a man who never was party to the chancery proceedings might use against his adversary all the depositions, that made against him, and he in his own advantage could not use the depositions that made for him, because the other party, not being concerned in the suit, had not the liberty to cross-examine, and therefore cannot be encountered with any depositions out of the cause.

Depositions before answer not to be read, unless party in contempt.

6thly. Depositions before an answer put in are not admitted to be read, unless the defendant appear to be in contempt; for if a cause do not appear to be depending, then are the depositions considered as voluntary affidavits: for unless a suit be shewn to have been commenced, it does not appear, that the adverse party had liberty to cross-examine; but if the adverse party had been in contempt, then the depositions of the witnesses shall be admitted, for then it is the fault of the objector, that he did not cross-examine the witnesses, since he would not join the examination of the witnesses.

Rule of equity for reading depositions where bill is dismissed.

When the bill is dismissed, the rule as to the reading of the depositions is this; where the bill is dismissed, because the matter is not proper for equity to decree, yet the depositions on the fact in the cause may be read afterwards in a new cause between the same parties, for though the matter be not proper for equity to decree, yet there was a cause properly before the court, for 'tis proper for the jurisdiction of equity to consider how far the law ought to be relaxed and moderated, and where there is a cause properly before the court, however that cause be decided, yet the depositions in that cause must be evidence, as well as in all others.

But if a cause in equity be dismissed for the irregularity of the complainant, the depositions in that cause can never be read; as

where a devisee, on a suit pending by his devisor, brings a bill of revivor, and several depositions are taken, and then the cause on the hearing is dismissed, because a devisee claiming as a purchaser, and not by representation, cannot bring a bill of revivor in this case, and in a new original bill exhibited, the devisee cannot use the former depositions; for in the first cause, mistaking the bill that he ought to bring, there was no complaint before the court, since the court allows not any devisee to complain in that manner by right of representation, and their being no cause regularly before the court, there could be no depositions in it.

Depositions in a cross cause.

In cross causes in equity, an agreement was proved in one of the causes, and in that cause it was not set forth in the allegations of the bill nor answer; in the other cause, the agreement was set forth in the bill, and not proved in the cause, and an order was obtained before publication, that the same depositions should be read in both causes; and by the better opinion, this might be, but since the order was before publication in the second cause, the defendant had liberty to cross-examine the witnesses, on which particular he pleased, and the sight of the depositions was to his advantage.

In law courts, examination *de bene esse* cannot be read after the death of witness.

If a witness be examined *de bene esse*, and before the coming in of the answer, the defendant not being in contempt, the witness die, yet his deposition shall not be read, because the opposite party had not the power to cross-examine him, and the rule of common law is strict to this, that no evidence shall be admitted, but what is or might be under the examination of both parties.

Otherwise in chancery.

But in such cases as these, the way is to move the court of *Chancery*, that such a witness's depositions may be read, and if the court see cause, they will order it, and this order will bind the parties to assent to the reading of such depositions, though it do not bind the court of *nisi prius*, and this is thought just, because the witnesses are examined by the officers of the court, who are supposed to favour neither party.

Where ancient depositions may be read, and why.

Formerly they did not inroll their bill and answer, but as it seems, the bill was left loose in the office with the clerks of the office, and was thereby subject to be lost; and therefore, ancient depositions may be given in evidence without the bill and answer.

* The ancient practice was also, that they never published the

* Practice of Chan. 7. 1 Atk. Rep. 459, The competency of a witness cannot be impeached, after publication, because this might have been objected to, and inquired into upon the examination, by *Hardwicke*, chancellor. 3 Atk. Rep. 643; but will allow credit of a witness to be impeached after publication, because the matters ex-

depositions in the life time of the witnesses, because the depositions *in perpetuam rei memoriam*, were of no use till after the death of the witnesses; but this practice was found very inconvenient, because witnesses became thereby secure in swearing whatsoever they pleased, inasmuch as they could never be prosecuted for perjury, the effect of their oaths not being known till after their deaths.

False depositions in Chancery and Exchequer liable to perjury.

Depositions in chancery or exchequer, are not of themselves records, but they are oaths in a court of record, and therefore it seems, a witness swearing falsely may be prosecuted either at common law, or upon the statute, because this is perjury in a court of record.

So in the spiritual courts, if upon matter within their competency.

*Depositions taken in a spiritual court, in a cause relating to lands, cannot be read, because they are no oaths at all, inasmuch as the spiritual courts have no authority to take depositions relating to lands; but it seems they may be read when taken in a cause in which they have authority, as far as relates to that cause, inasmuch as these are lawful oaths, and a man may be indicted for the violation of them, though they be not oaths in a court of record.

†A decree in *chancery* or *exchequer* may be given in evidence, and so may a sentence in the ecclesiastical courts, for their judgments must be of authority in those cases, where the law gives them a jurisdiction; for it were very absurd, that the law should give them a jurisdiction, and yet not suffer what is done by force of that jurisdiction to be full proof, for that were to suppose they were incompetent judges, where they had jurisdiction.

Verdict given in evidence.

Another way of perpetuating the testimony of a person deceased, is by giving the verdict in evidence, and the oath of the party deceased; where you give in evidence any matter sworn at a former trial, it must be between the same parties, because otherwise you

mined in such cases were not material to the merits of the cause; yet not where a commission is to go to foreign parts, because this would introduce a certain method of delay, unless no person in England can swear to the person's credit, by *Hardwicke*, chancellor. 3 Atk. Rep. 648.

* 2 Sid. 454. March. 120. Styl. 1. Cro. Jac. 463.

† 2 Mod. 231. 2 Stra. 960, 961. Eq. abr. 227, &c. Ch. Prec. 59, 64, 116, 212. 10 Mod. 42, 43, 44, 74, 108, 109, 126. Vern. 53, 413. 2 Vern. 471, 591, 547, 555, 603. Fitzgib. 197. Lord Raym. 734, 893, 936. P. Will. Rep. 414, 415. 8 Mod. 75, 181, 322. 9 Mod. 66. 11 Mod. 210 to 212. Gilb. Eq. rep. 2, 203, &c. 12 Mod. 24, 85, 136, 215, 231, 305, 310, 319, 339, 342, 343, 375, 394, 414, 494, 500, 521, 555, 565, 579, 607. Stra. 95, 162, 308. See Barn. K. B. 243. 2 Stra. 960, 1151, 1242. 2 Rol. ab. 679. Wils. Rep. K. B. 124, 125. Cas. temp. Hadw. 12. A sentence of divorce in the ecclesiastical court, pleaded on a prosecution for bigamy, in the house of lords rejected, after advising with the judges. Duchess of *Kingston's* trial in 11 Vol. State Trials, edition 1776.

dispossess your adversary of the liberty to cross examine; besides, otherwise you cannot regularly give the verdict in evidence, and when you cannot give the verdict in evidence, you cannot give the oath on which it was founded, for if you cannot shew there was such a cause, you cannot shew that any person was examined in that cause and without shewing there was a cause, no man's oath can be given in evidence, inasmuch as that appears to be a voluntary affidavit.

What a man swears at one trial cannot be evidence at another.

What a man himself, that is living, has sworn at one trial, can never be given in evidence at another trial to support him; though what the witness has said in discourse, may be given in evidence to support him; because the same oath at another trial is no evidence of the truth of any man's swearing; for if a man be of that ill mind to swear falsely at one trial, he may do the same on the other, on the same inducements; but what a man says in discourse without premeditation or expectation of the cause in question, is good evidence to support him; but if a man have sworn at one trial different from what he hath at another, this is good evidence as to his discredit. In the case of the *Bishop of Lincoln* v. *Sir William Ellis and others*, A. D. 1722*. Upon a bill for tithes, as rector of *Barney*, in the county of *Lincoln*, the defendants insisted, that the lands were parcel of one of the greater monasteries, dissolved by the statute of 31 H. VIII. c. 13.

Decree in a cause wherein the lessee only, and not the impropriator was a party admitted to be read in evidence.

A decree was offered to be read in evidence, wherein *Sir Thomas Skipwith*, lessee of the then Bishop of Lincoln, was plaintiff against the then tenants of the land; but it was objected to the reading of it; for that no admission of the lessee shall bind him that has the inheritance, and who was no party to the decree.

But by the opinion of the Lord Chief Baron *Montague*, and Baron *Price*, it was read; who said, they should have made no doubt of reading it, if the lessee had prevailed; and therefore they saw no reason, why it should not, since he did not prevail; but Baron *Page* was of another opinion, and his reasons seemed to be the better.

Decree refused to be read because not touching the same lands.

The case of *Benson* v. *Olive*, A. D. 1730, was an important decision, viz. that where an impropriator's right to tithes is admitted, and the defendant pleads an exemption, he must prove his own exemption, and the impropriator is not driven to prove payment of tithes to him, though lay, any more than if he had been an ecclesiastic. Several points upon admission of evidence occurred there, which were 1st †, a decree in 1673, was offered to

* Bunb. 119. † Bunb. 284.

be produced in evidence wherein the then impropriator was plaintiff, and *Semain* defendant, and wherein the plaintiff's title was affirmed; but the court would not permit this decree to be read, because the now plaintiff could not shew, that the defendant claimed either the same lands, or under the same title as *Semain*.

Minister's accounts temp. Hen. VIII. permitted to be read.

2. It was objected for the plaintiff, that the defendant's producing minister's accounts 34 and 35 H. VIII. was not sufficient, being subsequent to statute 31 H. VIII. c. 13, but that he ought to shew the surrender, or when it came to the crown, but this objection was over-ruled.

Deed 40 yrs. old proves itself.

3. A deed was produced by the plaintiff, dated 30th March, 1690, and it was admitted it was old enough to be read without proof: but Baron *Carter* objected, that the plaintiff should give some account how he came by it; but the Lord Chief Baron said he could not see the use of that, and it would be very inconvenient, for then there must have been an interrogatory to prove this matter by depositions; for it could not be enquired into on the order to prove exhibits; and the deed was read at last, but by consent, though the rest of the barons seemed to be of opinion with the Lord Chief Baron *.

A deed 35 years old does not prove itself.

4. Another deed in 1694 was offered, but objected to by the defendant, as not being old enough to prove itself; and by the court, this deed was not admitted to be read; for though sometimes 35, or even 30 years have been thought sufficient, yet not where it is objected to; but the usual rule is 40 years.

Verdict not proved to touch the same lands refused to be read.

5. The plaintiff had brought an action on the statute of 2 and 3 Edw. VI. c. 13. and obtained a verdict, which he offered now in evidence; but it was opposed, because this was a matter, which happened after issue was joined in this court; and the plaintiff not being able to prove, that that trial was for the same lands, the court refused to admit it.

Bill and answer, when admitted to prove moduses.

In 1781, *Ashby* v. *Power* †. An original bill for tithes by the rector was revived by his executrix. The defence was moduses. It was alleged, that a bill had been filed about 1680, by the rector against an occupier, where the occupier set up a modus different from the present. There was likewise a terrier of 1697, stating, the rector to be entitled to all tithes great and small, and making mention of a rate tithe of 40*s.* in one district, whence it was inferred, that no such existed in the rest of the parish.

* But Qu.—Whether Baron *Carter's* were not the better opinion.

† 4 Gwill. MS. 1238.

(On the offer to read the above bill and answer, it was objected that nothing appeared to have been done in consequence of the answer, and the lands could not be identified. But this was answered by saying, that there was evidence to shew, that the whole of the now defendant's lands were in the occupation of the former defendant. And the court held it to be admissible, if the lands could be identified. Depositions were read for that purpose; but these being too loose, the answer was rejected. To shew the magnitude of the present value, the plaintiff gave evidence of assessments of the tithe to the poor rates, which on debate was admitted: but the assessments from some townships only being produced, it amounted to nothing.)

Evidence in a former cause between same parties admitted.

In *Morgan* v. *Neville* *, 1773, the court of Exchequer decreed a custom of carrying every 10th meal of milk to the church porch, without sending it to a jury *(reclamante Adams B.)* and the plaintiff's counsel proposed to read depositions taken in a former cause between the same parties. The defendant's counsel insisted, that it was not competent to the plaintiff to read them: but this objection was over-ruled, it appearing to the court, that the same question was in issue in that cause. The depositions were accordingly read for the plaintiff, and also the depositions taken in this cause on behalf of the defendant.

Depositions touching other lands than those in suit, cannot be read.

Though the case of *Scott* v. *Allgood* †, A. D. 1792, ended in a compromize; yet in the cause it appeared, that a bill had formerly been filed by Dr. *Scott*, against a person of the name of *Elliot* for agistment tithe, and *Elliot* had insisted on a modus of 1*d.* for hay, and agistment for the ancient farm, which he occupied, and which was called *Haughton Strother*. In that cause a person of the name of *Pickering* had been examined as a witness, and was since dead. The cross bill stated those facts, and stated the evidence which *Pickering* gave in that cause, and interrogated Dr. *Scott*, whether *Pickering* did not give such evidence. Dr. *Scott* in his answer said, he did not recollect what evidence *Pickering* gave, and for the particulars of it referred to his deposition taken in that cause. The defendant's counsel having read this passage in Dr. *Scott's* answer, offered the deposition of *Pickering* in evidence, and insisted, that whatever doubt there might be whether it would be evidence otherwise, Dr. *Scott* had made it evidence by referring to it in his answer, which was the same thing, as if he had stated the deposition in his answer; and that a defendant by referring to

* 3 Gwil. 1045, Eyre's MS. † 4 Gwil. MS. 1369.

any paper makes it evidence; as, when he refers to the answer of other defendants.

But the court rejected the evidence, and said, that the modus set up by *Elliott* being for a particular farm, which was not in the occupation of any of the parties in this suit, could not be evidence in this cause; and that Dr. *Scott* by referring to it in his answer did not make it evidence, for it amounted only to saying, that he did not recollect the deposition, and that it would speak for itself.

Why and when terriers admitted.

In a very recent case, *Illingworth* v. *Leigh* *, A. D. 1800, a bill was filed in the Exchequer for agistment tithe by the vicar against the impropriatrix, and as the whole of the case turned upon the admissibility of evidence, it cannot but prove interesting and instructive. The bill in this case was filed by Doctor *Illingworth*, as vicar of *Fillongley*, in the county of *Warwick*, against the honourable Mrs. *Leigh*, the impropriatrix of the rectory, and a Mrs. Baker, one of her tenants; and the principal object of the suit was, the recovery of agistment tithe.

In support of the claim, the vicar produced the minister's accounts from Michaelmas 27 to Michaelmas 28 Hen. VIII. which stated the rectory to consist only of garbs and hay. *Firma rectoriæ de Fillongley, quæ solummodo consistit in garbis et fœno.* He shewed too, from an ecclesiastical survey taken in 26 Hen. VIII. the relative value of the rectory and vicarage at that time, inferring from the great proportion, which the value of the latter bore to that of the former, that the vicarage must have had all the small tithes. The next evidence was a suit in 1654, instituted by two persons of the name of *Holbeche*, as lessees of the rectory claiming, among other tithes, that of herbage. The defence then set up was, that the rector was never seised of the herbage tithe, and that it was due to the vicar if to any one. The decree in this cause was not produced, nor any thing more than the bill and answer. This evidence was followed by the production of several terriers, some of which stated the vicar to have *all small tithes* generally, and others gave him expressly and in terms the herbage of barren cattle; and three of those of the latter description bore the signature of a person, who was at that time the lessee of the rectory. It was in proof, that all the vicarial tithes had been time out of mind under a general composition.

The first of these terriers, which the vicar produced was signed by the church-wardens only. Two objections were taken to it:

* 4 Gwil. 1615.

1st. It was insisted that it was no terrier at all, because made by the church-wardens only, and not signed by the vicar: that the minister's signature was essential to give the instrument the character of a terrier: that where it wanted that signature, the court had often refused to receive it, though it came from the minister himself. 2dly, it was insisted, that even supposing it to be a proper terrier, yet that it could not be admitted in evidence in this cause as against the rector, because not signed by any person claiming under, or on the part of the rector.

Authenticity of terriers.

In answer to this it was said, that notwithstanding this informality, the instrument in question must be considered as a terrier: that it purports to be an account of the church, is signed, as far as it goes, by the proper officers, and comes out of the proper office, the bishop's registry: that terriers were often signed by curates only, and yet were received in evidence: that they were entitled to credit, because returned to the bishop upon oath: that the objection, that it was not signed by any one on the part of the rector, had been often over-ruled: that terriers were so received, because evidence of reputation, and they were here offered to prove, that of which reputation was evidence: that the terrier in question, besides coming from an unsuspected place, was signed by persons perfectly disinterested, to whom it was a matter of entire indifference, whether they paid to the rector or the vicar; at the same time that it was of importance to them to ascertain, to which of them they were to make their payment, in order that they might not be liable to make it twice over.

The court were of opinion that the terrier was admissible, for that it had been recognized in the character of a terrier by the spiritual court: that such an imperfect terrier had been often received of late in this court: that it was true, that Lord Chief Baron *Skynner* had once rejected it, but that he had afterwards changed his opinion, and since that time it had been uniformly received: that the present terrier was signed by persons not only no way interested; but whose duty it was from their official situation to do it: and that the want of the vicars signature made it a stronger piece of evidence in his favour.

The case so made out by the vicar was met by the impropriatrix with the following evidence. She first produced terriers of antecedent date to those, which had been brought by the vicar, some of which were signed by the vicar only; but none of them made any mention of agistment tithe, and one of them, signed by the vicar and church-wardens, purported to be "*An account of all such*

things as are due and tithable to the vicar of the parish of Fillongley." She next produced the deposition and decree in that suit, the title and answer, in which had been brought forward by the vicar. That decree gave the rector 2*s.* for every pound rent, for the agistment tithe; and it purported to proceed (among other evidence) upon two very ancient accounts in the time of Edw. IV. But this decree was only against one of the defendants, *Taylor*; nor did it appear, that the cause was ever brought to a hearing against the others. And *Taylor* appeared to be occupier only of a particular piece of land, formerly parcel of Fillongley park. She then read depositions in another cause, by which it appeared that several compositions had been received for the herbage-tithes of *Fillongley* park by a Mr. *Paulett*, the then impropriator. She afterwards offered in evidence the books of former lessees of the rectory, the entries in which shewed the receipt of sums of money for the herbage tithe, and some of those entries were made by those very lessees, who had signed the terriers acknowledging the vicar's title to the herbage tithe.

Admissibility of parson's books.

The admissibility of this last evidence was strongly objected to by the vicar's counsel. They said, that although a parson's book might be read, yet that of an impropriator or his lessee could not: that a spiritual rector or vicar was under no temptation to fabricate evidence, having no estate which he could dispose of, nor any interest beyond his own incumbency: that the impropriator had the inheritance, the lessee an assignable interest; that they therefore had both of them strong inducements to fabricate, inasmuch as the saleable interest of the latter, and the reversionary estate of the former, might be greatly benefited by it: that the case of the parson's book respecting his tithes had always been considered as a solitary exception to the general rule: that it was so stated to be by Lord *Kenyon* in the case of *Outram* v. *Morewood*, 5 Term Rep. 123, that it was not therefore to be built upon as establishing a principle, nor to be followed into all its consequences: that the books of a receiver charging himself with the receipt of money, in such a case might be admitted, because there is no suspicion of forgery, the receiver having a direct and immediate interest to the contrary; it not being supposable, that he would charge himself with money, which he had never received: that these books could not be admitted as evidence of reputation, because reputation itself would be no evidence in this case, where it is to prove a particular fact: that there was no instance in a question simply of tithes, where the books of a former impropriator had been re-

ceived to assist the claim of the present impropriator; that in the anonymous case in *Bunb.* 46. * It is true the books of the impropriator's predecessor were admitted: but that was not a suit for tithes, but for mortuaries: besides that case of *Woodnorth* v. *Lord Cobham*, (*Bunb.* 180.) was clearly distinguishable from the present; for the entries there admitted were not those of a former impropriator or his lessee, to support the claim of the plaintiff, impropriator, but were the accounts of a steward of the father of the defendant, a parishioner; and those accounts stood clear of all suspicion, the steward having no interest to induce him to state such a payment to have been made to the vicar, if in point of fact it had not been made.

But, *per curiam*, the question is, whether there be any degree of influence upon the mind of a lessee more than on that of a rector or vicar, whose books are constantly received to support the demands of his successors. It would be of no avail to a lessee to fabricate, since he could not make what he might insert evidence during the term, either for himself or his assignee. These are general accounts of the receipts made during the term, and seem entitled to the same credit with the entries made by a parson during his incumbency. Lord *Kenyon* could not mean to say, that the case of a parson's books was the only exception to the general rule, that any other case falling within the same principle would not be admitted.

It appeared from these books, that in the years 1718, 1719, and 1729, the lessees had received in several instances for the herbage tithe; but that in 1727, 1728, and 1729, there were no receipts by them of that species of tithe; and upon the whole, of at least a hundred occupiers in the parish, only two or three had ever paid it. It also appeared from these entries, that the lessees had received a composition for coppice wood, a circumstance, which was relied upon as negativing the extreme restriction of the minister's accounts, and shewing that the *solummodo* was incorrect.

* That case is as follows: "Upon a bill by an impropriate rector for a mortuary, the book of some of the impropriate predecessors, was offered to be read in evidence, wherein were entries of payments of mortuaries; but it was objected, that although a parson's book (who is only tenant for life, and therefore not supposed to enter any thing with partiality to his successor) may be read. Yet the book of a lay impropriator, who has the inheritance, ought not to be read. To this it was answered, that the book of a lord of a manor, who has the fee, is admitted as evidence of quit rents. (*Sed quære*, if the bare entry of a lord of a manor in his book be evidence, though a bailiff's accounts, where it appears the rents have been paid and allowed in the accounts, are admitted as evidence.) *Per Curiam*. Let the book be read.

These written documents were followed by some parol evidence. A former tenant of a piece of pasture called the *deep moor* deposed, that he had paid to the lessees of the rectory for eleven years 10*s.* *per annum*, for herbage tithe, and had also paid during part of that time 2*s.* 6*d.* *per annum* to the vicar, but what he had paid this last sum for he knew not, and had discontinued it at the desire of his landlord. Two or three other witnesses stated, that the lesses of the rectory had insisted upon an herbage tithe in those years, when the lands were not ploughed.

Upon this evidence the court directed an issue, to try whether the vicar were entitled to the agistment tithe, which came on to be tried at the summer assizes, 1799, at *Warwick*, before Mr. J. *Heath*, when a verdict was found* in favour of the vicar. Upon the trial of the issue, the counsel for the impropriatrix offered in evidence depositions in a suit between *Holbeche*, a former lessee, and *Whadcock*, an occupier, but produced neither bill nor answer.

Depositions received in evidence without producing either bill or answer, or giving any proofs of their contents.

It was objected by the vicar's counsel, that without the bill and answer, or proving that all due diligence had been used to discover them, but without effect, and giving collateral proof of their contents, these depositions could not be received: that it was necessary to produce the bill and answer, in order, that it might be seen who the parties were, and what were the questions in issue between them, because the depositions could be evidence only between the same parties, or those claiming under them, and upon the same point: that it was clear from the depositions themselves, that the vicar was not a party to the suit, because he was examined as a witness; that the suit therefore was as to him *res inter alios acta:* that the only ground, upon which it could be contended they might be admitted was, where hearsay or reputation were evidence: that hearsay could not be evidence in this case, because it was to prove a particular fact: that the very depositions themselves were confined to the claim of agistment tithe in a particular place, and did not affect to speak of the general custom of the parish. The learned judge was clearly of opinion, that they were inadmissible and accordingly rejected them, and cited *Gilb.* 65. Sir *Thomas Raymond*, 336. *Newburgh* v. *Newburgh*, 1 *Br.* P. C. 347. *Baker* v. *Sweet Bun.* 91. *Anderton* v. *Magawley*, 3 *Br.* P.

* At the trial, the vicar produced the minister's accounts for three successive years, the whole time the rectory was in the hands of the crown. The rectory was appropriated to the priory of *Maxtoke.*

C. 208. A new trial was moved for upon two grounds: 1st, that the learned judge was mistaken in rejecting the above evidence; 2ndly, that the verdict was against the weight of evidence. And the court granted a new trial, expressly upon both of these grounds, but gave no reasons that have been reported, why they thought the evidence, which the learned judge had rejected, ought to have been admitted. Upon the second trial a verdict was found for the impropriatrix, where the matter ended.

A verdict between the parson and one occupier is evidence in a case upon the like point between the parson and another occupier.

In *Travis* v. *Challoner* and others*, 1781, a point of evidence arose and was thus determined: viz. whether a verdict, which had been given between the same vicar and other occupiers on the question, "whether the payment called the tilth-penny were paid "and payable in lieu of tithe hay," in which the affirmative was found, were admissible evidence in this cause. The objection was "*res inter alios acta*:" but the court said, that in these cases, a decision between the vicar and one occupier was evidence in a case between the vicar and another occupier, and to exclude the evidence would end in the exclusion of nine-tenths of the evidence in this and all similar causes: but that the evidence was at the same time open to all imputation of fraud, collusion, mistake, &c.

Various sorts of written evidence.

The written documents next to records of the court, which are frequently required to be proved in tithe causes, are endowments, terriers, deeds of composition, and other deeds, parsons' books of account, &c. We have before remarked (p. 111,) that the law favours the endowment of vicars, that after long continuance of an appropriation without proof of the instrument; the vicarage shall be supposed or presumed to have been lawfully endowed. But when a copy of the endowment is to be proved in court, the general rules of evidence are to be observed †.

* 3 Gwill. 1237.

† The reader will find a copy of an old endowment in App. No. LIII. The Rev. Mr. *Bateman*, in his before-mentioned publication, gives this useful information concerning endowments. "Wherever the tithes of any church are divided, and there is a vicarage endowed, in order to know, how they were originally appropriated and apportioned, and to which only, therefore, the rector and vicar are now respectively entitled, the only way is to consult the endowment; the original instrument if yet existing, may be met with, either in the registery office of the bishop, or of the dean and chapter of the diocess, or augmentation office, *New Palace-yard*, *London*; and a copy procured of such endowment, from the register of the said office, or his deputy.

"The first of the above-mentioned offices, is the most likely to meet with the endowments of all, or any particular vicarage in any diocess. But such as are not to be found in any of them, must either have been entirely lost or destroyed, or carried to *Rome*, with many other records of the like nature, at the time of the dissolution of the

Case on the evidence of an endowment and an *inspeximus*.

The case of *Potts* v. *Durant* *, 1796, turning wholly upon the admissibility of evidence of an endowment and an *inspeximus*, I conclude, that both the arguments of counsel, and the opinion of the court will afford more instruction upon the general subject than any thing extracted from, or grounded upon the decision of that case. The plaintiff claimed tithes as vicar of *Flixton*, in *Suffolk*. He offered as evidence of his right, an instrument without a seal remaining, which purported to be an endowment, dated 1321, and another dated 1412, having a seal annexed, purporting to be an *inspeximus*, under the seal of the Bishop of *Norwich*, and containing a copy of the former, which it stated to be then in the registry of the diocess. These two papers belonged to and were produced by Mr. *Astle*, (the keeper of the records in the tower, and himself a considerable collector of ancient MSS.) who had purchased them at the sale of the effects of the late Mr. *Martin*, an eminent collector †.

monasteries, or not long after at the reformation. It may perhaps be of some use and advantage here, to advise every vicar, who may chuse to apply to any of the above offices for a copy of the endowment of his vicarage, to give particular directions to have what is called an *extended copy*, that is, one, in which all the words are written out at full length."

"For the originals are all in such old, uncouth, obsolete latin; without either stops or capital letters, and in so very antique and uncommon a character, with all the words so abbreviated, that unless accustomed to the reading of such writings, he will be able to make out a column of Egyptian hieroglyphics as soon as one sentence of his endowment in its original state. And it may perhaps be of equal use to both rectors and vicars, and their respective parishioners to know of what consequence these original endowments are; and in what decisive authority they are held in all litigations respecting the rights of either in every court, and in every case, where they can be produced, viz.

"That the first endowment cannot be prescribed against. They are of such authority as no time can destroy. *Nullum tempus occurrit talibus ordinationibus.*

"In many cases they have been admitted as sufficient evidence, to give to the vicar tithes never before claimed; and to restore to him those usurped by the rector or impropriator."

* 3 Ans. 789.

† Mr. *Martin* obtained this and many other MSS. through his wife, who was widow of Mr. *Le Neve*, the keeper of the records of the chapter-house, *Westminster*, in which many of the writings of the smaller monasteries are deposited; hence it was suggested, that they had originally come from that repository. These circumstances were stated by Mr. *Astle* to the court, on his being examined to prove the exhibits. After the decision of the court, rejecting the evidence, the counsel for the defendants prayed to have leave to exhibit interrogatories to prove the facts, and also to prove the seal to be the bishop's, and the deeds to be in the mode of writing used in the time they bore date, that these facts might appear on the record for the purpose of a re-hearing or appeal. They insisted on the probability of Mr. *Le Neve* having taken out these MSS. from the registry, and forgotten to restore them, or died before having an opportunity to do so: that this testimony had been before the court, and considered as facts in the cause, though not on the record, and that they ought therefore to be put in such a form, as to have the same

He also produced a record in the archdeacon's registry of that diocess, of the induction of a vicar in 1321, (a few months after the endowments) to the vicarage "*de novo ordinatam.*" The augmentation office and the bishops' registry had been searched, but no endowment or copy of it could be found. The rectory belonged to the Nunnery of *Flixton*, which was dissolved by 27 H. VIII.

Burton, *Partridge*, and *Alexander*, for the defendants, objected that this evidence was not admissible. An endowment is like a terrier, an ecclesiastical muniment, which ought by law to be kept in the registry of the diocess, and has its authenticity from being found in that repository. The copy kept by the nunnery ought to be in the augmentation office. Unless the instrument come from one of these offices, it is not entitled to be received as an endowment. *Atkyns* v. *Hatton*, and *Miller* v. *Foster*. So in the case of the *Chandos* peerage, the house of lords rejected a piece of evidence coming from the *Ashmolean* museum. The production of the copy, verified under the seal of the ordinary, throws a suspicion on both. The only motive for taking such a copy, to be kept with the original, must have been, that the original was defaced or worn out by length of time.

Graham, *Plumer*, and *Fonblanque*, on the other side. The general inclination of the courts in modern times has been to consider objections to testimony, as applying to the credit rather than the admissibility of the evidence *. In this case the credit of the instruments is unimpeachable. It is proved by the induction of the vicar 1321, that there was an endowment then lately made, which is not found in any of the proper repositories. It is proved, that this is of the hand writing of that time; and it is impossible to shew an intent, either at that time or afterwards, in those persons from whom Mr. *Astle* purchased, to fabricate a forgery.

The proper repositories of peculiar muniments.

Even a terrier may, by the determination of the Court of King's Bench, in *Miller* v. *Forster*, be received in evidence, although coming out of private custody. But the custody of a terrier is more nearly of the essence of the instrument; it becomes a terrier by being returned to the bishop. An endowment is like any other grant. The custody is immaterial, unless as a circumstance, affecting the credit of the evidence produced. The most suspicious of all custody is that of the party interested in the contents, yet all

weight on re-hearing or appeal. The court thought the application to add to the record after the decree irregular, and it was refused accordingly.

* *Walton* v. *Shelley*, 1 Term Rep. 300. *R.* v. *Bray*, Rep. temp. Hard. 358.

deeds and charters relating to private concerns, are in that custody. The register of the diocess is the repository of ecclesiastical endowments, and other deeds, as the private charterchest of an individual is expected to hold the muniments of his estate. Yet evidence adduced from other quarters may be good.

It is not true, that the registry of each diocess contains all the muniments, which properly ought to be lodged there; many are extremely defective, none perfect. There being no endowment of this vicarage found there, while it is clear one did exist, proves a deficiency in this case. The augmentation office is still more imperfect. On the dissolution of the monasteries, few of them had any desire to preserve their muniments for the use of their plunderers. Many carried them to *Rome*, others suffered them to be dispersed in private hands, many of which have been saved and collected by the curiosity of individuals. If a man have lost a deed for any space of time, does it lose its authenticity by ever having been in the casual possession of a stranger? It must even be argued, that a document which has ever been suffered to go out of the public custody, although afterwards restored, has for ever lost its claim to be admitted as evidence. In this case, the endowments coming into private hands is accounted for either from the history of the dissolution of the monasteries, or by supposing it to have been taken out of the registry by Mr. *Le Neve*.

Supposing the original endowment not to be admissible, as not having a seal, nor the authenticity derived from public custody, that will let in the *inspeximus* as evidence. It is a copy and the original lost. The seal proves itself independent of all other circumstances *. Even a new grant from a corporation is so proved. The production of the first without a seal, which is the essence of a deed, explains the necessity of the convent obtaining from the bishop this confirmation of its existence.

The case of the *Chandos* peerage turned upon the nature of the paper produced; it was a pedigree made out by a stranger, who

* The following note was found in the hand writing of Mr. *Martin*, out of whose possession the endowment was purchased by Mr. *Astle*.

"The Honourable *James West*, Esq. member of parliament for *St. Albans*, has the "original deed, in which the abbot and convent of *St. Edmond's-bury* convey to *St. Sa-*"*viour's Hospital* in *Bury*, two portions of tithes of the demesne of *Herringwell* in "*Suffolk*. This deed was produced before the four barons of the Exchequer, on hear-"ing the cause between *Burton*, clerk, and *Holden*, Esq. concerning the tithes of *Her-*"*ringwell* farm, in 1756."

Upon referring to the minutes in the *Exchequer-chamber* book, 26th February, 1756, it appears, that a deed corresponding to the above description was read in evidence.

Mr. *West* was a great antiquary, and collector of curious MSS.

did not appear to have had any access to know the correct history of the family, and not recognized as authentic, by being placed among their muniments.

The case stood over for the opinion of the court on this point.

Macdonald, Chief Baron. This cause has stood over for the court to deliberate on the admissibility of the two instruments produced by the plaintiff. The objection is, that they come out of the hands of a private person, instead of that repository which the law has allotted to such instruments. It was attempted to trace them from that repository, but we do not see sufficient probable testimony of that fact, and can only consider them as coming out of private custody. The present possessor bought them out of another private collection; we can trace them no further.

As the distinctions upon this subject are not very clearly defined, we have consulted with others of the judges, how far the courts ought to go in admitting such testimony; and we are satisfied, that this is an attempt to go further than the courts ever have gone or ought to go. The instruments come out of the custody of a private person, perfectly unconnected with the matters contained in them. In general, an ancient manuscript, the actual execution of which cannot now be otherwise proved, receives authenticity from its being found in that place, in which such an instrument ought properly to be. It is true, that where a connection can be established so as reasonably to account for the custody, in which the instruments are found, the courts have somewhat relaxed the rule, and admitted them to be read, though not coming from exactly the most proper repository. In *Miller* v. *Forster*, I have reason to believe that the court of King's Bench, in granting a new trial, proceeded upon the ground of the connection between the terrier and the custody, in which it was; and a strong corroborating circumstance in that case was, that the terrier was found annexed to an old lease of the prebend, of nearly the same date. But where the custody is merely private, and wholly unconnected with the subject matter, the courts have never gone the length of admitting such papers in evidence.

In the present case, there are considerable circumstances to induce a belief of the authenticity of the instruments produced; the unimpeachable character of the gentleman, by whom they are produced, the improbability of any person having had an interest to fabricate them, the appearance of the instruments themselves, and the corroboration given by the induction, which mentions an endowment to have been then lately granted, would probably be suf-

ficient to convince any mind of their authenticity, if they could be received in evidence consistently with the rules of law.

The plaintiff offered in evidence a terrier signed by the vicar and inhabitants; it was found in the registry of the archdeacon of the diocess. A terrier found in the archdeacon's registry is admissible.

Burton objected on behalf of the impropriate rector, (who was also proprietor of the greatest part of the parish,) that this was not admissible as not coming out of the proper repository.

The court said, that terriers were in fact often deposited there, and over-ruled the objection.

He then objected, that the terrier was not evidence as between the rector and vicar, in ascertaining the tithes of each. A terrier is an ecclesiastical instrument directed by the bishop to ascertain the glebe lands of the church, and the portions of tithes out of the parish. To that extent it has authenticity as a legal instrument. The tithes in the parish are not regularly included in it. They are indeed in practice always inserted, and the terrier becomes evidence between the vicar and the inhabitants by being signed by both. As against the rector he contended, that it was not admissible on either ground. How far terrier evidence against impropriator.

He informed the court however, that he recollected a case, in which the same objection was made in this court, while Lord C. Baron *Skinner* presided in it. The court were divided in opinion, and came to no determination till after his death *, when Lord C. B. *Eyre*, and a majority of the court, being in favour of the testimony, it was admitted.

The court over-ruled the objection.

The plaintiff proved, that he was entitled to some tithes in kind, but a composition having been received by his predecessors, for many years, it could not through the negligence of all parties be ascertained what tithes in particular were due to him.

The court directed an issue to try whether he were endowed of any and what tithes.

A terrier according to Lord C. B. *Macdonald*, in † *Miller* v. *Forster*, at *Warwick* assizes, 1794, is an instrument well known in the law. By the canons it is directed, that an enquiry shall be from time to time made of the temporal rights of the clergyman in every parish, and returned into the registry of the bishop, the proper guardian of those rights, for his information. That re- What a terrier is.

* This was a mistake of the reporter, it should have been *resignation*.

† 4 Gwill. MS, 1406.

turn is called a terrier, and has anthenticity from being found in the proper place. Then this paper purporting to be an instrument taken notice of in the law, must stand or fall according as it has the requisites of such instrument to render it authentic.

Admissibility of terrier and an old map.

* *Allott* v. *Wilkinson*, and *vice versâ*, in 1775, went up to the lords upon appeal from an order of the Exchequer for a new trial, upon the grounds of the insufficiency of evidence and misdirection of the judge: and the case chiefly turned upon the admissibility of a terrier, and an old map of the parish for determining the boundaries thereof. The defect in the proof of the quantity was not cured by the terrier of 1706, where the quantities were expressed not in words, but in figures only; because that terrier was not signed by the owner or occupier of the lands belonging to the appellant, and was contradicted by two subsequent terriers, signed by the respondent's predecessor. The appellant submitted the following objections to the competency and credit of the map, on which the respondent's right to the glebe lands in question was founded. 1st, This map having been delivered to the respondents predecessor, and in his possession, it was totally deprived of its original validity, as applied to the rights of the appellant; and especially when erazures and alterations evidently appeared to have been made upon it in many places, and in particular upon the pieces, which related to the glebe. 2nd, No acquiescence in the descriptions of this map had ever been shewn by any person, whose property it was said to describe, to denote the accuracy, or prove the authenticity of it; nor was it signed by any of the persons, whose rights were affected by it; though it were made to describe whole parishes, and the possessions of different proprietors. 3rd, The specific quantity of each piece was not marked, nor was there any account of what quantity of land in general was belonging to each proprietor, but from the letters of reference which are liable to interpolation; as was the quantity of each piece to augmentation by erasures, or diminution by the inserting a line. The quantities contained in each piece, by admeasurement from a scale, must be extremely uncertain, and must depend upon an accuracy in the delineation, which scarcely any map would admit of; and least of all a map, which notwithstanding the declaration of the surveyor, had on the face of it the most palpable marks of negligence and inaccuracy. There were several pieces described in the map, to which even at this time no letter was affixed; and there was one

* 3 Bro. P. C. 689.

piece on which two different letters were affixed, referring to different parishes. 4th, The map was in the possession of the respondent's agents for a considerable time; copies were clandestinely taken of it, without any application to the court of Exchequer, and the pretended survey was made in the same clandestine manner, without the knowledge of the appellant.

On the other side it was said on behalf of the respondent, that the objection to the map appeared the more extraordinary, as it was made under the direction of the lord of the manor for the time being, and was produced by the appellant, the present lord of the manor; and therefore seemed to be evidence perfectly unexceptionable as against him. The terrier was authenticated by the signature of the rector, the parish officer, and other considerable inhabitants of the parish, and was produced from the bishop's registry, the proper repository for such instruments. In questions of this sort, terriers are always received in evidence; and in this instance, the terrier and map derived by their coincidence additional credit from each other. The appeal was dismissed and the order for the new trial affirmed *.

Evidence of deeds.

As to the deeds, which require to be proved in tithe causes, they are generally either deeds of composition †, or leases of tithes, as far as they affect the clergy: though deeds affecting tithes of impropriators, inasmuch as they are lay fees, are as indefinite as deeds affecting any other species of lay property. The general rule of a deed of 40 years proving itself was noticed in the before-mentioned case of *Benson* v. *Olive*.

Evidence of entries in the books of an incumbent

In *Legros* v. *Levemur* ‡, 1679, entries in a predecessor's books were admitted as good evidence for the incumbent; yet certainly this cannot be established as an invariable rule. On a trial at law for tithes of a mill, the plaintiff offered in evidence an ancient book, (produced in this court at the hearing,) wherein one of his predecessors had made entries of what he had received for tithes for several years, whilst he was vicar, as well for the mill in question, as for other tithes. But the judge would not suffer it to be read in evidence, whereby the plaintiff was non-suited. A new trial was ordered on payment of costs, and, by the defendant's consent, the book to be read in evidence. Conformable hereto was the *dictum* of Lord Chief Baron *Bury*, and Baron *Price*, in Lord *Arundell's* case §, 1718, that books of account, memorandums, &c. of a pre-

* For the nature and form of a terrier, vid. App. No. LIV. † Vid. forms of such deeds, App. No. LV. ‡ 2 Gwil. 529. *Dod's* MS.
§ 12 Vin. Ab. 255.

ceding vicar, may be made use of as evidence for his successor, to support his demands in case of tithes, &c. In *Woodnorth* v. *Lord Cobham* *, 1724, an impropriator filed his bill for tithes, and the defence was a money payment annually, in lieu of certain tithes. And to prove this, the defendant produced accounts of one *Edward Chaplin*, who was steward to the defendant's father, wherein there were entries of this payment. But it was objected for the plaintiff, that though a parson's or a vicar's books (where it appeared that payments were made,) were good evidence, yet never admitted in the case of him, who has the fee.

But *by the court*, (Baron *Price* dissenting;) even old rent rolls (where it appears payments have been made) are good evidence. And they ordered these entries to be read. But note, by Baron *Gilbert*, they ought to be read, because no better evidence can be had: but if *Edward Chaplin* had been alive, they ought not.

The payment of this *modus* to the vicar being fully proved, the court dismissed the bill with costs.

Entries in a collector's book admitted by Lord Hardwicke.

In *Jones* v. *Waller*, 1753 †, Lord *Hardwicke* admitted a book of a collector of the tithes in 1679, to be read as evidence of payment of tithes without proving his hand writing, from its being found in the hands of the successor of the collector; but the court of exchequer ‡ would not permit several receipts for payment of tithes offered to be proved *vivâ voce*, to be read as evidence, because they were signed by the receiver's deputy and not by himself. As to the value of a living it was said in *Stump* v. *Ailiffe*, 1692 §, that the king's books are the conclusive rule of evidence.

Copies of parish surveys (the originals being burnt) admitted.

Copies of the surveys made under the commission of 1647, (the originals having been burnt in the fire of London) have been uniformly admitted as evidence, in a variety of instances. In 1647 ‖, the parliament issued commissions for surveying all the crown and church lands in *England*: copies of the surveys, after they were returned, were deposited in most of the cathedrals in *England*. The originals were burnt in the fire of *London*. Ruled, on a trial at bar, that the originals, though taken on commissions granted by an usurped government, were good evidence, because the grantors were then in actual possession of the government, and all acts in judicial matters ought for peace and convenience to be ratified. Therefore as the originals are lost, and the copies kept in usus

* Bunb. 180. and 2 Wood, 226. † 2 Gwil. 847. MS. ‡ Vide *Leigh*, 1756. 3 Gwil. 861. § 1 Raym. 72. from Dod's MS. ‖ 2 Gwil 542. *Underhill* v. *Durham*, 1694. MS. vide also Freeman, 509. s. c.

pected places, of which a good account may be given, they ought to be read. The like was ruled at *Stafford* assizes in 1738, in *Swinton and Digby*, in a case about a custom to be free from tithe-wood in the hundred of *Offlow*, where such copies of surveys kept in the cathedral of *Litchfield* were read. From Mr. *Ford*'s notes at *Bridgewater*, Summer assizes 1738, between *Bagshaw*, lessee of Sir *G. Wynn* and Bishop of *Bangor* and *Manley* and others, on a question about the bounds of a manor, a copy of the survey of *Denbigh* manor taken in 1649, from the Augmentation Office, was objected to, because, as these surveys were taken by virtue of commissions, those commissions ought to be produced. But the copy was read, and the above case of *Underhill* and *Durham* was cited.

Admissibility of ancient surveys.

In tithe causes, very frequent resort must necessarily be had to ancient surveys, upon the admissibility of which there have been several determinations, as in * the *Vicar of Kellington* v. *Master and Fellows of Trinity College Cambridge*, 1749, before Lord Chief Baron *Parker*. This is a bill brought by a vicar, for the tithe of *agistment* of barren cattle, setting forth that he is entitled by endowment, prescription, usage or otherwise, to all *small tithes* within the parish; and to make out his right thereto, produced in evidence an ancient survey, (from the First-fruit's Office,) of the possessions belonging to the nunnery of without the walls of *York*, to which this rectory was appropriated; which survey was taken in the year 1563, upon the dissolution of the monasteries temp. Hen. VIII. whereby it appeared, what species of tithes belonged to the rector, and what to the vicar, viz. corn, grain, and hay to the rector; and to the vicar, wool, lamb, and all other *small tithes*; also another survey taken by the college, *anno* 33 Eliz. was produced, which agreed with the former. It was objected, that it does not appear by what authority the survey in the year 1563 was taken: The answer is, that these surveys have always been allowed as proper evidence, and to be read, notwithstanding the commissions under which they were taken, be lost; it has also been objected, and it appears in proof that *agistment* tithes have been paid to the rector for 50 years last past; in answer to this it is proved, that before that time, viz. 60 years ago, this species of tithes was paid to two vicars; so that I am of opinion, here has been an usurpation upon the vicar, for 50 years last past. If an endowment appear, that is the rule we are to go by; if it do not,

* 1 Wils. 170.

usage is the rule; therefore if there had not been this written evidence, (to be sure) the payment to the impropriator for 50 years would have been very strong proof for him against the vicar; but on the other side, here is a record which proves, that the vicar is entitled to all *small tithes*, and at this day there is no doubt, that *agistment* tithe is a small tithe; and the court decreed in favour of the vicar.

What evidence of value admitted.

Yet in the before-mentioned case of *Ashby* v. *Power* it was said *per Hill*, Serjeant, *arguendo*. As to the valuations they are of no force: there were two valuations, one in the 19th and 20th Ed. I. some mistakingly call it the 29th Ed. I. the other in the 26th H. VIII. Now the valuation in the 19th and 20th is 24*l.* though the other is 21*l.* The great variety in the coin of this kingdom is one strong reason against giving much weight to apparent rankness; for 1*l.* formerly was a pound weight. A mark was of different value at different periods. Lord *Coke*, in his comment on the statute of *Gloucester*, says, 40*s.* was then something more than three times what it is now. At the time of the second valuation there were 48*s.* to the pound; at the time of the first 20*s.* so that in the time of Ed. I. the valuation was in effect returned double as high as in Hen. VIII. valuation. This proves the valuation of Hen. VIII. to be greatly below the real value. The clergy understanding the design of the valuation, took care to have the value much underrated. So on the suppression of the monasteries the rating was extremely low. So were the rents: there are many instances of the letting out on old leases at 35*l.* 45*l.* and 55*l.* Yet the valuation of Hen. VIII. only at 5*l.* Perhaps too the present value may arise from bequests to the rectory since the time of Hen. VIII. That valuation in truth affords no rule even for probable conjecture. It is objected, that the witnesses do not prove the payments to be moduses: but they prove the antiquity of those payments, and their opinion of them. The subject matter will only admit of belief: nothing further can ever be sworn with propriety. And 1791, in *Tamberlayn* v. *Humphries* *, Lord Chief Baron *Eyre* observed; the survey does not affect to be a correct description of the things, but of the value of the receipt. It is always loose evidence, and very often contradicted. If usage had been with it, it would have been of weight; but the evidence is against it; for the rector has been paid what is not mentioned in the survey; the sur-

* 4 Gwil. 1347. MS.

vey does not specify the vicar's tithes, and the terrier does not specify the *4d.* to be for hay.

Copies of ancient agreement permitted to be read in evidence.

In *Downes* v. *Moreman* *, 1724, it was decided by the exchequer, that written evidence giving *all and all manner of tithes*, will support a claim to a portion of tithes, and there a copy of an agreement between the Abbot of *Quarr* and the monks of *Lyra* was produced in evidence; to which it was objected for the plaintiff, that by the rules of evidence it could not be read, being neither a record nor a public thing. But by the defendant producing a copy of the statutes of *Oxford*, that no book, &c. should go out of the *Bodleian* library; the court gave him leave to read this copy of agreement in evidence, though they admitted it not to be within the general rules of evidence, upon the very particular circumstances of this case. And with reference to the evidence of copies from this same abbey of *Lyra* in *Normandy*, Lord *Hardwicke* observed in *Carte* v. *Ball* †, 1747, that there the plaintiff was unfortunately for him precluded by the rule of this court from reading the evidence of the endowment, which, it is said, would have put this matter out of question. The Abbot of *Lyra*, in *Normandy*, has sent a certificate of the original agreement between the rector and the vicar, in relation to the tithes; but though it appear to come out of the abbot's hands, yet as it does not appear that it came out of the charter-house of the abbot, or that he was the proper officer to keep the records, it could not be admitted to be read. Even before the Reformation a certificate from a foreign abbey was not allowed; therefore, as the original deed relating to the endowment cannot be read, I must take it from the evidence before me, which is, that no tithe has ever been paid to the vicar. The terriers are very dark, and I can hardly make any judgment of them, and it is very far from being clear from thence, that tithes were ever paid to the vicar.

Copy of original endowment from the abbey of Lyra refused by Lord Hardwicke.

Who may give evidence in tithe causes.

Having considered the admissibility of different sorts of written evidence, it naturally occurs to consider, what persons may or may not from their relative situations and circumstances be permitted to give evidence in tithe causes. Suffice it to observe, that as to unwritten evidence, the general rules of admitting or excluding witnesses prevail in tithe as well as in other causes. Persons are excluded from all attestation from want of integrity and discernment ‡. It is a general rule, that persons interested in the matter in question cannot be admitted. So no man can be a witness for

* Bunb. 189. † 3 Atkyns, 497. ‡ Gilb. Ev. 119, &c.

himself, but he is the best witness, that can be against himself; where a man who is interested in the matter in question would also prove it, it is rather a ground for distrust, than any just cause of belief; for men are generally so short sighted, as to look at their own private benefit, which is near to them, rather than to the good of the world that is more remote; therefore, from the nature of human passions and actions, there is more reason to distrust such a biassed testimony, than to believe it: it is also easy for persons who are prejudiced and prepossessed, to put false and unequal glosses over what they give in evidence, and therefore the law removes them from testimony, to prevent their sliding into perjury; and it can be no injury to truth to remove those from the jury, whose testimony may hurt themselves, and can never induce any rational belief.

An executor may be sworn in a cause relating to the will, where he is not residuary legatee, because he is no more than a trustee, and has no interest; but where a man has a trust coupled with an interest, he cannot be sworn in the proof of it, because he is looked upon in law, as master of the estate of it.

If a man promise a witness, that if he recover the lands he shall have a lease of them for so many years, this excludes the evidence; for here the witness would have a fixed and certain advantage by the event of the verdict, and by consequence his attestation is to derive an interest to himself.

The men of one county, city, hundred, town, corporation, or parish, are evidence in relation to the rights, privileges, immunities, and affairs of such town, city, &c. if they be not concerned in private interests in relation thereunto, nor advantaged by such rights and privileges as they assert by their attestation.

But the men of the county cannot be sworn in a cause relating to the bounds of the county in a suit depending between that and another county, carried on at a county charge, because every man is in such a case concerned to prevail in point of interest.

If the hundred be sued on the statute of *Winton*, no person of that hundred can be a witness, because every person's interest is concerned in the tax of the hundred, and therefore swears in his own discharge.

So the inhabitants of a parish cannot be witnesses in relation to common or the *modus decimandi* *, because this touches the private interest of those persons, and the loss or gain falls upon their private fortunes.

* *Dictum* in *Howard* v. *Bell and others*, 1618, Hob. 92.

In the great case upon the exemption of the weald of *Kent* from the payment of tithe-wood, which was established in the before-mentioned case of the *Earl of Clanrickard* v. *Lady Denton*, 1619, the bare question of custom or not went to the jury, and on the part of the plaintiff to prove the custom this evidence was given: Witnesses deposed, that through several parishes within this precinct, they had seen several coppices fallen, and no tithe paid for them. And for this the testimony of those, who had bought the wood of the coppices was thought the more proper; for the buyer is to pay the tithe, and not the seller. And the general testimony of others, who said they had not seen any tithe paid, was not thought material, being merely negative. Note, in this case, the testimony of all those, of whatsoever condition or reputation they were, who were entitled, either as owners or farmers, to any wood within the *weald of Kent*, was rejected: for the custom being alleged to be general through the whole weald, though they were not parties to the suit, yet, for that the custom concerned them in their private profit and in this immunity, they were *quasi* parties, and their testimony *quasi in propriâ causâ*. As in the case of a common, if the right be alleged in a whole vill, though the suit be between particular persons, yet none of those, who claim common under the same prescription shall be admitted to give evidence. So in the case of a *modus* laid in a whole vill: for those within the vill, are parties in interest, though not to the action. So in disproof of the custom, the evidence of any person, who was owner, proprietor, or farmer of a parsonage, was rejected.

Interested witnesses not admitted to prove a custom.

In 1754, Lord *Hardwicke* spoke very explicitly upon the evidence to be given of a *modus* in *Chapman* v. *Smith* *. The plaintiff, upon his general right as rector, is certainly entitled to his demand of tithes in kind of these lands, if no bar be shewn; the defence insisted upon is a *modus*, and undoubtedly, as against the right of the rector, it is incumbent on the defendant to maintain that *modus* in point of law and fact.

What evidence to support a modus.

There are two general objections against allowing this *modus*, which are insisted upon as sufficient to overrule it now. First, that it is not sufficiently proved in point of fact; the other, that if it were so, yet that is not good in point of law; which objection in point of law divides itself into two objections: the first a general one, that the affirmative part of the *modus*, the payment of 9*d.* an acre, cannot have subsisted time out of mind; of which

* 2 Ves. 506.

the court is bound to take notice; and that it cannot have subsisted time out of mind, from the alteration of the value of money, because 9*d.* an acre must be much above the value of the tithe of this land at the time this modus or composition must be supposed to commence; which the law of *England* by a pretty extraordinary law, (and which I believe no other country does,) makes from the transportation of Richard I. to the *Holy Land:* the other is an objection tending to the same thing, that this *modus* cannot have subsisted time out of mind, because there is an exemption of a product and culture, which was not made, and could not be used at the time it was supposed to commence; and that this exemption being part of the agreement, must be co-eval with the agreement itself, which shews it could not be an agreement time out of mind.

First, As to the proof of the *modus* in point of fact, upon which many observations are made on the part of the plaintiff, (and certainly, in cases of this kind, these observations have been frequently made, and have justly had weight;) that there is a great variation in the proof; that none of the receipts call it a modus; only two of the witnesses call it so; the others say, there have been such payments for tithes generally; and one calls it a composition; and Lord *Talbot* has said, he would not call it a modus, if none of the witnesses would. If not one, that might be a material observation; but that, I am of opinion, is too slight an observation in general, that because these witnesses (who are *lay gents.*) do not make use of a legal technical word, that customary payment shall be overruled. The question is upon the fact; the law makes the inference. Next, that the receipts do not call it a modus; and that they are very nice in taking receipts. Very often ministers will not call it a *modus* in the receipt, because they will not prejudice their successors, though they will give a receipt for the same, as usual; in very few instances will the rector submit to call it a *modus* in the receipt; and if he will not, the parishioners cannot compel him, but must submit, or pay without a receipt. And that sort of evidence is in some measure strengthened by a letter of the plaintiff's, in which he does not, (and very rightly,) call it a modus; but insists on this payment as the payment usually made for this land formerly, and upon an account and payment to be made up on that foot, as the right he insisted upon; whereas he might have demanded an account and satisfaction for tithe in kind, if this were not a composition or *modus*, that bound him. But as to all these observations, I should lay much more stress on them,

if there were any evidence for the plaintiff, either of actual payment of tithe in kind, or of a tradition thereof, for this marsh land, of which there is none, either of the fact of payment of tithe in kind, or any tradition from any ancient persons; which is proper evidence in cases of custom and usage. Then the positive proof on one side is strengthened by the weakness or want of positive proof (which implies a negative) on the other side. It is determining cases not on the merits, but according to the critical penning of depositions. The want of any evidence, not only of payment of tithe in kind, but of any tradition, takes off the weight of the observation, that this might have commenced within a short space of time; for then some tradition would have been shewn, that tithe in kind had been ever paid, or even insisted upon or demanded; but there is none. If, therefore, it rested on the proof, it is impossible to say, that a decree must be made for payment of tithe in kind, which as at present I cannot allow.

Evidence of custom in a neighbouring parish inadmissible.

In the case of *Erskine* v. *Ruffe and Brewster*, 1769*, before Lord Chief Baron *Parker*, which was a very important determination, that corn was titheable in the sheaf *de communi jure*, and not in the shock; and that barley and oats are titheable in cocks, and not in the swarth, the plaintiff's counsel objected to the reading any evidence taken in this cause relating to the custom of tithing in other parishes, and the court allowed the objection.

More latitude in evidence of tithes than other matters.

In favour of the rights of the church, the law generally allows greater latitude in the proof of tithes, than in other matters. So in *Gregory* v. *Lutterell*†, 1718, "a paper signed in 1639, to prove a composition for rabbits on *Brampton* burroughs, by the predecessor of the present vicar, &c. was read by the barons, (*Page hæsitante*,) though no direct proof that the defendant claimed under the person, who signed it, the warren, (that is, burroughs,) &c.: it appearing that it was of an ancient date, that the estates mentioned in it were as defendant now had; and there being proof of the hand-writing of one of the witnesses, &c. but afterwards held, that it was not sufficient to support plaintiff's demand for the uncertainty, as that there might be a warren at another place, or a piece of ground so called, or the composition might be for other tithes arising out of the warren."

When an interested witness to be objected to.

In the before-mentioned case of *Doctor Scott* v. *Fenwick and others*, an objection was made to the evidence of a witness, because it appeared on his cross-examination, that he was interested.

* 2 Rayn. 568, and 3 Gwil. 965. † 12 Vin. Ab. 255, and 2 Wood, 114.

To an interrogatory asking the witness, whether he were interested or not, it was answered in the negative. After this the party proceeds in his cross-examination, and thereby makes him a competent witness. *Per cur'*. at law the old rule was, that the witness must be rejected, if at all, on the *voir dire**, before the examination in chief began, and after such examination once commenced, the adverse party could object to his credibility only, and not to his competency. But this rule was found inconvenient, because it often happened, that an interest denied on the *voir dire* came out clearly on a cross-examination. The court therefore has, for a long time past, permitted the objection to prevail, whenever the interest appeared in the course of the examination, provided the party entitled to the benefit of the objection urged it immediately; still holding, that if after the ground of objection appeared, the party proceed in his cross-examination, he thereby waives the objection, and shall not afterwards have liberty to make it. The rule of evidence in equity ought to be analogous to that in courts of law. When the interrogatories are drawn, it is impossible for the party to know what answers the witness will give to them, consequently, there is no opportunity of stopping in the course of the cross-examination, and of urging the objection, till after the depositions are published and the evidence comes to be read in court. Then if the party permit the evidence to be read, he thereby waives the objection to the competency of the witness. But if he use the first opportunity that offers, by urging it at the hearing before the evidence is read, it ought to be admitted, and to prevail. If this be not the rule in courts of equity, it is time, that the question should be mooted, and that it should now be established one way or the other.

Length of possession evidence to support plea of *nil debet* to an act on the statute of Edw. VI.

Evidence of a *modus* will support a plea of *nil debet* to an action of debt for tithes of corn and hay, as was ruled at *Dorchester* assizes, in 1699, in *Charry* v. *Garland* †, and in *Kinaston* v. *Clerk* ‡, 1769. At *Salop* Summer assizes an action was brought on the statute for not setting out tithes; *Yates*, J. in summing up to the jury, said, that the same evidence was admissible in this, though a penal statute, as to proof of title, as if it had been in ejectment: and therefore as men's deeds and evidences were liable to be lost, he should consider a length of possession and perception of the tithes as sufficient title. But yet, as tithes properly lay in grant, he should consider 20 or 30 years possession as very weak evidence

* i. e. *verum dicere*. It is sometimes prayed at a trial at law, that a witness may be sworn upon a *voir dire*, that he shall speak the truth, whether he be or be not interested in the event of the suit. † 3 Gwil. 951. ‡ 5 T. Rep. 265.

of title unaccompanied by deeds; but, in the present case, the plaintiff produced deeds for near a century past, in which *tithe-hay* was conveyed; which he held sufficient evidence. And he said, in an action of this kind, he thought it necessary to prove perception of tithe in kind, within 40 years before action brought, analogous to the reasoning of the legislature at the time of making the act; which mentions, that in order to entitle the plaintiff to the action, the tithe must have been paid within 40 years before the making of the act.

The defendant proved a payment of 1*s*. 6*d*. for about 50 years back; and it appeared, that the value of the tithe would not at most have amounted to above 18*s*. *per annum* at this day. This, he said, savoured of a rank modus, and looked more like a conventional payment: for if it were taken as a modus, it must have subsisted time out of mind, which was as far back as the time of Ric. I. and at that time 1*s*. 6*d*. was as much as 18*s*. are at this day, and therefore must have been the full value of the tithes.

And he thought, that this was the only legal action for the trial of right to tithes. He thought it a fair way of trying it, wherever they had been paid within 20 or 30 years; if they had not, he thought it would be hard to subject the party to a penalty which included in the idea of it a wilful and criminal default.

Action of debt on 2 E. VI. and declaration therein.

The plaintiff had a verdict; and the finding was 4*s*. for the single value of the tithes, (not by way of damages,) leaving it to the court to treble it *. Conformable with these determinations was the case of *Mitchell* v. *Walker* †, 1793, which was an action of debt upon the statute of 2 and 3 Ed. VI. and the declaration stated, that the plaintiff was rector of the parish of *Thornhill*, and as such was entitled to all manner of tithe within the same, except, &c. and that the defendant on 1st January, 1791, occupied 22 acres of land called *Headfield closes*, within the said parish, and that the tithes of corn and grain yearly arising from the said land of the defendants within 40 years next before the making of a certain act of parliament, made in the 2d and 3d Ed. VI. entitled, "*An Act for Payment of Tithes*," and then were of right yielded and payable, and yielded and paid, to the rector of the said parish, &c. and that defendant being so occupier, and the plaintiff so be-

* Mr. Justice *Buller*, from whose manuscript this report was taken, thought it rather a loose note, and not much to be depended upon.

† 5 T. Report, 260. I have given this case at large, by way of shewing the nature of a declaration in this species of action upon the statute of Ed. VI. being a very ordinary action.

ing rector, &c. he the defendant on 1st of Nov. 1791, ploughed his said land, and sowed the same with corn, &c. and afterwards, &c. reaped, &c. the tithe of all which said corn, &c. did of right belong and appertain to the plaintiff as rector as aforesaid, and of right ought to have been separated from the other nine parts thereof, and to have been yielded and paid to him; yet, the defendant well knowing the premises, but not regarding the statute, &c. did not justly divide, &c. the tenth part of the said corn, &c. but took and carried away all the said corn, &c. before it was divided, &c. contrary to the statute; the declaration then alleged the value of the tithes taken away to be 4*l.* 8*s.* and demanded treble the value. The defendant pleaded *nil debet*, on which issue was joined.

This cause was tried at the last *York* assizes before *Buller*, J. when it appeared, that the land in question, which was within the parish, as far back as any witness knew had been in grass, and had been ploughed for the first time within their knowledge in 1791; and no evidence was given of its ever having paid tithe.

The stat. 2 and 3 Ed. VI. c. 13. enacts, "That every of the "king's subjects shall from henceforth truly and justly, without "fraud or guile, divide, set out, yield, and pay all manner of their "prædial tithes, in their proper kind, as they arise and happen, "in such manner and form as hath been of right yielded and paid "within 40 years next before the making of this act, or of right "or custom ought to have been paid; and that no person shall "from henceforth take or carry away any such, or like tithes, "which have been yielded or paid within the said forty years, or "of right ought to have been paid in the place or places titheable "of the same, before he has justly divided or set forth for the "tithe thereof the tenth part of the same, &c. under the pain of "forfeiture of treble value of the tithes so taken or carried away."

Chambre, for the defendant, contended at the trial that the jury were bound to find for him, unless they found that tithes had actually been paid in respect of this land, within 40 years before the statute, of which there was no evidence: on the contrary, the evidence given rather went to rebut such a presumption, and was sufficient to warrant the jury in presuming a grant in favour of the defendant.

Verdict for plaintiff.

A verdict, however, was given by the learned judge's direction for the plaintiff, with liberty for the defendant to move to enter a nonsuit, if the court should think the evidence insufficient to support the action.

A rule having since been obtained to enter a nonsuit,

Law now shewed cause against it. There is no case, wherein it has been held necessary to prove, that the lands had paid tithe within 40 years next before the statute of Ed. VI. in order to maintain such an action as the present. Lord *Coke*, 2 Inst. 649, 650, treating of this branch of the statute, takes no notice of it. The presumption of law is, that all land is titheable; and the *onus* of proving an exemption in favour of any particular land lies on the party claiming it: nor has it ever been held sufficient to shew, that the land has not paid tithe before, within living memory; though that sort of evidence may be applicable to identify lands in old deeds, which were discharged of tithe by some legal exemption, but here no such evidence was given*. He was then stopped by the court, as were also *Cockell*, Serjeant, and *Lambe*, on the same side.

Rule to shew cause why a nonsuit should not be entered.

Chambre and *Wood contrà*. The objection, that there was not sufficient evidence to support the action is decisive; 1st, on the words of the statute; 2dly, on the authority of cases: and 3dly, on the presumption of a grant. 1st, The words of the statute are express, that no person shall take away the prædial tithe, which hath been yielded or paid, or ought to have been paid, *within 40 years next before the making of the act*, &c. The penalty is confined in terms to such cases: and if it be to be extended to all tithe, whether paid or payable within 40 years next before the statute or not, those words will be rendered nugatory. Now there was not even the slightest evidence offered to shew, that this land had paid tithes within the 40 years. There can be no presumption of law in this case, because this is not an action for any common law right, but for a penalty under a statute, within the precise words of which the party seeking to recover such penalty, must bring his case. The statute expressly confines the penalty to cases, in which such (that is, prædial) tithe had been paid or ought to have been paid, within 40 years before. But however the presumption may be in ordinary cases, the evidence given in this case affords a strong presumption against the plaintiff; for it goes to prove, that the land had always been in pasture, and consequently could not have paid prædial tithe at any time before. And though this evidence might not be sufficient to exempt the lands from payment of tithes altogether, yet it is a sufficient defence in this action on a penal statute; and the plaintiff may still sue in a spiritual court. But, 2dly, the case of Lord *Mansfield* v. *Clark*, M. 9 G.

* Vid. *Hanking* v. *Gay*, Bunb. 37.

III. C. B. is decisive, that some evidence of payment having been made within 40 years next before the statute is necessary. The court there granted a new trial for the defect of such evidence for the plaintiff. In the argument of that case was cited another of *Adenbrooke* v. *Stokes*, tried before Lord Chief Justice *Willes* at *Stafford* assizes, 1745, which was a similar action, on the statute 2 and 3 Edw. VI. for subtraction of tithes; where the learned judge non-suited the plaintiff for not proving payment of tithes within 40 years before the *action*, in analogy to the limitation of time in the statute. And though decision was cited by Mr. *Wilbraham* before Lord *Hardwicke*, in the case of *Rotheram* v. *Fanshaw* *, and approved by the court. 3dly, the non-payment of tithes within memory was evidence of a grant of the tithes. It was so considered in the case of Lord *Mansfield* v. *Clarke*.

Opinion of the court.

The *court* wished the question to be put upon the record, if the defendant's counsel thought it with his client; but the other side objected on account of the expence.

Lord *Kenyon* C. J. Since it is necessary for us to give our opinion, I confess my inclination is strongly in support of the action; for though the defendant's argument would have great weight, if we were now to decide on the statute of E. VI. for the first time, yet the usage has constantly been against the necessity of the proof contended for by the defendant under the statute. And I remember many actions tried, where the lands, in respect of which the tithes were claimed, had been lately enclosed, and where the same objection, had it been available, must have prevailed, but the plaintiffs recovered in all of them. The stat. of E. VI. was passed soon after the dissolution of the religious houses in this kingdom, before which time the tithes were in the hands of religious men, and the usual remedy for the subtraction of them was in the ecclesiastical courts. But when tithes became lay fees, it was thought necessary to provide a remedy for such injuries in the temporal courts, and therefore the statute was passed for that purpose. Now it is not disputed, but these lands are titheable, and that payment may be enforced by a more extensive mode of proceeding. Laymen cannot prescribe *in non decimando*. The non-payment of tithe of itself signifies nothing: tithe is every day claimed for lands enclosed out of wastes, which never paid tithe before. The only objection then is to the form of the action, which I do not think well founded. The words of the statute extend to tithe paid, "or

* 3 Atk. 628.

which of right or custom ought to have been paid." Now what ground have we for saying that tithe ought not to have been paid here? The presumption of law is in favour of the rector. And I never heard, that a different sort of proof of title was required in this from any other form of proceeding for the recovery of tithes. Mr. Justice *Yates* in a case, the name of which I think was *Kynaston* v. *Dickson*, thought the same evidence applicable in this as in any other case. In the case cited of Lord *Mansfield* v. *Clarke*, the declaration was drawn differently from the present; for there it was only stated, that the tithes had been paid within 40 years before the statute; the court went on that distinction; and they ordered the declaration to be amended before the second trial, and the word "payable" to be inserted.

Buller, J. With respect to the presumption of a grant in favour of the defendant, I thought I could not leave that question to the jury, without some evidence to support it, and here was none. If indeed it had appeared, that this land had been ploughed before, and yet no tithes had been exacted for it, that might have afforded some ground for such a presumption. And according to my note of the case of Lord *Mansfield* v. *Clarke*, (which Mr. Justice *Buller* here read as in note *; but the note cited at the bar differed in the

* Mic. 9 Geo. III. Chief Baron Lord *Mansfield* v. *Clarke*. This was an action on the 2 and 3 Edw. VI. c. 13. for not setting out tithes. There was a verdict for the plaintiff; and on a motion for a new trial, the opinion of the court was delivered by Lord Chief Justice *Wilmot*. In this case there are many difficulties that occur to us, and it must go back to be tried again. The declaration only states, that tithes have been paid for 40 years before making the act, but there is no averment, that tithes were payable, and of right ought to be paid, which is the case of all the declarations I have seen; and none of them rest it upon the payment only. There was no evidence of tithes having ever been paid at all, and that is a presumption that there was no payment for 40 years before the statute; and then the evidence does not prove the declaration; but if the declaration had said that tithes ought to be paid, another kind of evidence might have been given: therefore it would be proper to amend the declaration to bring the merits before the court. This seems to be a necessary averment, for the counsel for the plaintiff say, if tithes were not paid for 40 years before the statute, yet they ought to have been paid, of common right, and that would be sufficient. But it seems to us, that that cannot be the construction of the act, for then you make the last clause signify nothing, and that the 40 years are immaterial. But it may come out, that tithes within that statute must mean that they were paid within 40 years, or you must account why they were not paid; and then it would fall within the usual way of pleading that they are *payable*. I do not mean to give any positive opinion, but only to suggest the reasons of the court, why this case should be further considered. If tithes have never been paid, and no reason can be given why they never were, it will be open to another consideration. It is settled, that you cannot prescribe *in non decimando* against a lay impropriator more than a priest; but though that be so settled, yet is is likewise settled in *Rutheram* v. *Fansbaw*, that in case of a lay impropriator, the case is open to evidence of presumption of severance from the rectory, and so exempt; as by a grant from the

respect alluded to) great stress was laid upon that circumstance by Lord Chief Justice *Wilmot*, for he said, "if it appear, that this land has never paid, *and has been constantly ploughed*, it will be open "to presumption of a grant." But he thought that the *onus* of proving the exemption lay with the defendant. The other judges concurred.

Various actions to try right of tithes, moduses, &c.

Various actions at law may be brought to try the rights of tithes, moduses, or compositions: as in the noted case of *Sir William Ingolsby* v. *Wivell and another*, A. D. 1664, in *Hardress* *, upon the validity of an ancient composition, between the *Cistertian* abbot of *Fountain* in *Yorkshire*, and the prebendary of *Scodeley*, an action of trover and conversion † was brought for a lamb and a sheaf of wheat, and upon not guilty pleaded, a special verdict was found.

Debt lies for treble da-

In the chapter on moduses, we have pointed out the different

lay impropriator. I am aware this is the case of a college, and they are disabled from making a grant by 13 Eliz.; but before that time, they were at liberty to make such grants; and therefore if it appear, that this land has never paid, and *has been constantly ploughed*, it will be open to presumption of a grant. There might be some private disabling statutes of this college before the disabling statute, that prevented them from aliening for more than a particular term; for though the disabling statute of Eliz. gave a power of making leases for particular terms, yet it never meant to enable colleges to make longer leases than their private statutes warranted, where they were limited by them. If there be no statutes (as I am informed there are not) then the case will be left open to presumption.

* Hard. 38.

† For the sake of gentlemen not of the profession of the law, it may be noted, that the action of *trover* and *conversion* was, in its original, an action of trespass upon the case, for recovery of damages against such person as had *found* another's goods, and refused to deliver them on demand, but converted them to his own use; from which finding and converting, it is called an action of *trover* and *conversion*. The freedom of this action from wager in law, and the less degree of certainty requisite in describing the goods, (Salk. 654,) gave it so considerable an advantage over the action of *detinue*, that by a fiction of law actions of *trover* were at length permitted to be brought against any man, who had in his possession by any means whatsoever, the personal goods of another, and sold them, or used them without the consent of the owner, or refused to deliver them when demanded. The injury lies in the conversion: for any man may take the goods of another into possession if he find them; but no finder is allowed to acquire a property therein, unless the owner be for ever unknown: and therefore he must not convert them to his own use, which the law presumes him to do, if he refuse to restore them to the owner; for which reason such refusal alone is, *prima facie* sufficient evidence of a conversion, (10 Rep. 56.) The fact of the finding or *trover*, is therefore now totally immaterial: for the plaintiff needs only to suggest (as words of form) that he lost such goods, and that the defendant found them; and if he prove, that the goods are his property, and that the defendant had them in his possession, it is sufficient. But a conversion must be fully proved; and then in this action the plaintiff shall recover damages equal to the value of the thing converted, but not the thing itself; which nothing will recover but an action of *detinue* or *replevin*. 3 Blac. Com. 151.

cases, in which issues have or ought to be directed to juries to try different questions upon tithes. It was some time before the spiritual courts gave up the right of suing for treble damages on the 2 and 3 E. VI. The right however of bringing actions of debt upon that statute in the common law court was too strongly settled, as early as in the year 1598, in *Beadles* v. *Sherman* *, which was to the following effect. "Debt upon the statute 2 E. VI. for not setting forth of tithes, wherein he declares, that he was parson of *Lyllington*, in the county of *Cambridge*, and that the defendant being a parishioner there, and having corn there growing, &c. the tithes whereof amounting to the value of 50*l.* he had not set them forth: wherefore he demanded the treble value, viz. 150*l.* After verdict for the plaintiff, upon a *nihil debet* pleaded, it was moved in arrest of judgment, that the suit for this treble value ought not to be brought at the common law, but in the spiritual court, as it ought to be for the tithes, before they are set forth. But *Tanfield* for the plaintiff moved, that it might be well brought at the common law; and so it was ruled in the Exchequer, upon great advice, in the time of *Manwood*, betwixt one *Wood* and *Halton*; for there the information was brought by the queen only upon this statute, and the treble value was demanded, and adjudged that it lay not, for the statute gives it to the party grieved, and not to the queen. And then it was brought by *Wood*, being the party grieved, and he had judgment to recover, and a precedent in this court, *Hill* 34 *Eliz. rot.* 682 betwixt *Wentworth* and *Crisp* was cited, where such an action was brought, and the plaintiff had judgment to recover; and all the justices were of the same opinion in this case: but because it was a new case, they would advise until next term. Another exception was taken; because it appears, that the plaintiff had this parsonage in right of his wife for years, and so ought to have joined his wife with him in this action."

mages on 2 Edw. VI.

"The case was now moved again, to have the resolution of the court; and they all resolved, that the action well lay upon the statute. It was then moved, that those tithes were personal chattels, which appertained to the baron only, and he hath joined his feme with him in this action; and therefore it was ill, *sed non allocatur*. For the feme being termor, the baron is possessed of them in her right, and the action is given to the proprietor or farmer, &c. wherefore the action is well brought in both their names. And it was adjudged for the plaintiff. *Note*, that a writ of error

Baron and feme may join in such action.

* Cro. El. 608.

was brought upon this judgment. And the error was assigned in the point of law. And the judgment was affirmed."

What pleas may be pleaded to this statute.

To these actions upon the statute of *Ed.* VI. the defendant may plead either *non culpabilis* or *nil fecit;* as in *Wortley* v. *Heppingham* *. The rector of *Kirburton* in *Yorkshire*, in 1590, brought debt against the defendant upon the statute of 2 E. VI. for carrying away his corn, the tithes not being set out, and demanded the treble value. The defendant pleaded *not guilty*. *Coke attorney general*, moved, that it was not any issue in this action; but all the court resolved, that it was well enough; for it was not for a *non-fesance*, but for a *malfeasance*, wherein the tort is supposed; and in an action upon the statute, which prohibits a thing, upon which a penalty is demanded, the issue may be *non culp.* or *non debet*, and so it hath been oftentimes ruled in this court. Wherefore the issue was joined accordingly.

Five various points ruled in actions on this statute.

The following five points were ruled by the king's bench, in 1602 †. *Day* v. *Peckwell*, where the rector recovered in debt 78*l.* on this statute. 1st, The statute which gives treble damages, does not allow the jury to give other damages. 2nd. No costs being given by the statute, the jury cannot assess costs. 3rd, Two farmers may join in an action upon the statute. 4th, A farmer of tithes at all have an action, by the equity of the statute, because he has the right to the tithes, though the statute do not give the action to the farmer. 5th, An agreement with the one farmer shall bind his companion.

Lessee of rectorial and vicarial tithes may recover in one action, though he have several titles.

In *Champernoon* v. *Hill* ‡, 1605, debt was brought on this statute by a lessee of tithes, in which the plaintiff shewed, that two parts of the tithes of the place, &c. appertained to the rectory, and the third part to the vicarage; and that he had a lease for years of the rectory, and another lease for the vicarage; and for not setting forth of the tithes, he demanded according to the statute, the treble value; the defendant pleaded *non debet*, and found against him: and it was now alleged in arrest of judgment; that inasmuch as his cause of action is grounded upon several leases, he ought to have brought several actions, as his title is several; but the court held that the action was well brought, in regard he had both titles in him, and he is to have the entire tithes; and this action is brought upon the *tort*, because he did not set out the tithes; wherefore it was adjudged for the plaintiff.

* Cro. El. 766. † Moore, 915.

‡ Cro. Jac. 68. Yelv. 63. Moore, 914. 1 Browne, 86. Noy, 3.

This action of debt on the statute of *Ed.* VI. lies for an executor for tithes due to his testator, as appears by Mr. Justice *Moreton's* case, 1670 *, who brought debt as executor upon the 2 of E. VI. for not setting forth of tithes due to the testator. Upon *non debet* pleaded, and a verdict for him, it was moved in *arrest of judgment*, that this being a forfeiture given by the statute for a *tort* done to the testator, it could not be brought by the executor. To which it was answered, that this action was maintainable, within the equity of the statute of the 4 of *Edw.* III. which gives the executor trespass *de bonis asportatis in vitâ testatoris.* So an *ejectione firmæ* lies upon an ejectment done to the testator and *trover* and *conversion*, where the conversion was in the time of the testator. 1 *Cro* adjudged, that an executor may bring an action upon the case, against the sheriff, for an escape upon *mesne process* suffered in his testator's life time. And the court were clear of opinion for the plaintiff, and said it had been formerly resolved so in the Exchequer chamber.

Action may be brought by executor for tithes due to his testator.

It is to be noted, that no action lies on the 2 and 3 Edw. VI. for the subtraction of any other than of prædial tithes. In the case of *Norton* v. *Clarke* †, 1627, a writ of error was brought in the Exchequer chamber for the reversal of a judgment for *Clarke*, in an action by him against *Norton*, upon the statute of Edw. VI. and the second error, that was assigned, was, that an action of debt upon the statute would not lie for tithes of woad, because woad, according to *Speed*, in his *Chronicle*, is but an herb, and so in the nature of a small tithe, for which an action of debt upon the statute will not lie. For an action of debt will not lie for tithes of onions, radishes, &c. though they grow in a field; for they are small tithes. In M. 18 Jac. in the case of *Payne* and *Nicholson*, it was adjudged, that an action of debt would not lie for the tithes of wool and lamb. And Sir *Thomas Crewe* the King's Serjeant, said, that tithes are great or small *secundum quid.* For in some places those tithes may be said to be great tithes, which in other places are small tithes. Where the tithe of a thing is *magnus ecclesiæ proventus*, there it shall be reckoned among the great tithes: but where it is *parvus ecclesiæ proventus*, it shall be a small tithe. And therefore in *France*, the tithe of grapes is reputed among the great tithes, because it is *maximus ecclesiæ proventus*; whereas in *England*, the tithe of grapes is reckoned among

Action on this statute lies only for prædial tithes.

* 1 Vent. 30. 1 Sid 407, 88. Sir *Thomas Raymond* 57, 72. 2 Keb. 502. 3 Cro. 377, 384. Lut. 167. Jon. 173. 1 Rol. 913. 6 Mod. 126.

† 1 Gwil. 428, MS. Calth.

the small tithes, because it is *parvus ecclesiæ proventus*. And in the case at bar, because woad is not a thing frequently nor generally sown, it cannot be said to be *magnus proventus ecclesiæ*, and therefore is to be ranked among the small tithes. Upon a special verdict in one *Tyndall's* case, in C. B. it was adjudged, that the tithe of woad is a small tithe, and that it belongs to the vicar. And some tithes which *ratione speciei* may be prædial tithes and not small tithes, yet *ratione loci* may be small tithes. For which reason, if peas, or such sort of grain be sown in a garden, the tithes of them may *ratione loci* be small tithes; whereas if they were sown in a field, they would be and reputed to be among the great tithes, as being prædial tithes.

Action lies on this statute for woad as a prædial tithe.

Walter, Hutton, and Harvey, Justices, were of opinion, that the tithes of woad are prædial. The case was again argued in the following term, and it was agreed, 1st, that no tithes are tithes within the statute of 2 and 3 E. VI. for the subtraction of which an action upon the statute will lie, but prædial tithes. and, It was agreed, that the tithes of woad are prædial tithes, *nam oriuntur ex prædio*; and therefore they cannot be other, than prædial tithes, according to *Doctor and Student* 69. And P. 1 Ja. Rot. 1119. *Coke* and *Southby's* case in C. B. it was resolved, that tithes of apple trees are prædial tithes, and that debt upon the statute of 2 and 3 E. VI. lies for the subtraction of them. 3rd, There was a difference of opinion, whether an action of debt upon the statute of 2 and 3 E. VI. would lie for not setting out such prædial tithes, as are in their nature small tithes. And the better opinion of the justices and barons was, that an action would well lie. However, as *Hutton, Harvey, and Walter*, seemed to be of a contrary opinion, it was adjoined for that point.

Courts encourage actions on this statute.

In general the courts have given every encouragement to these actions brought upon the 2 and 3 E. VI. For in *Saunders* v. *Sandford**, 1617, which was an action of debt upon the statute of 2 and 3 E. VI. c. 13. after verdict for the plaintiff, it was moved in arrest of judgment by *George Croke*, that the declaration was insufficient, because it only stated generally that the plaintiff was seized of a portion of tithes of such lands, and made no title to the portion, which it ought to do; for a layman is not capable of a portion of tithes without special matter; and in 7 E. VI. Dy. 83. it appears, that there is a manifest diversity between a rectory and a portion of tithes *sed non allocatur*; for by *Montague* Chief

A portionist may declare generally on statute of Edw. VI. without setting forth his title.

* 2 Gwil. 298, MS. Calth.

Justice, *Croke, Dodderidge, and Houghton*, justices, there is no difference in reason between a rectory and a portion of tithes; for a layman without special matter is no more capable of the one than he is of the other; and as it has been often adjudged, that a claim merely as *proprietarius* of a rectory generally without shewing any title is good enough, the declaration in the case at bar, though it disclose no title, must likewise be good enough. Besides, the action being an action founded on a tort, and to punish a tort; and not being founded upon a title, it cannot be necessary to set forth the plaintiff's title. If indeed it were an action founded upon title, so that the right might come into question, in that case, undoubtedly, a title ought to be shewn, and if the plaintiff shew an insufficient title, he shall never have judgment.

In declaration on this statute not necessary to state the value of every particular kind of grain carried away.

It was next objected, that the declaration was insufficient, because it stated generally the asportation of so much grain of several kinds, and yet did not state the value of each, as the precedents were so that it might appear to the court, that the demand was according to law. *Sed non allocatur*, for the demand being of a certain sum, it is sufficient, though the value of each particular thing be not expressed. So in another case in the year 1619, *Dickinson* v. *Read* *, the King's Bench, where treble damages had been given on this statute, ruled, that notwithstanding the plaintiff declared of tithes of several things, yet it was sufficient to lay the damages entirely. So again in a declaration in debt on the statute, the plaintiff needs not shew forth his own title, though he claim tithes of land in another parish; as it was determined in the Exchequer in *Phillips* v. *Kettle*, 1660 †.

Grounds of giving notices for determining compositions.

We have before spoken fully of the nature of modern compositions, which are binding on the incumbent and parishioners as long, as they remain in force. But as these compositions can only bind the incumbent, because, as a party interested during his own incumbency, he may lawfully bind himself, but not his successors; and it very frequently happens, that an earlier determination to such compositions is put or attempted to be put, than would have taken place by effluxion of time. In other instances compositions are continued beyond the lapse of time, or the happening of an event, upon which they were in law made determinable; so arises the necessity of notice from the incumbent to the parishioners, or from them to the incumbent, before such compositions can

* 1 Gwil. Calth. MS. 358. † Hard. 513.

be legally determined. Many suits at law have turned upon the effects of such notices.

Where such notice necessary.

In the before-mentioned case of *Brown* v. *Barlow*, it has been observed, that a composition between the incumbent and his parishioners determines on his death: and the successor is not bounden in law to give any notice whatever of his intention to take his tithes in kind, or in other words to put an end to the composition of his predecessors: yet if upon his coming into the living he once accept of the composition, that is a confirmation of the composition, and he cannot afterwards determine it without notice. So in *Hilton* v. *Heath* *, 1753; to a bill by impropriator for tithes, a plea was put in, that one *J. Hulbert* being employed and duly empowered by one *Mary Walker*, then reputed owner and impropriatrix of the said rectory of *Lyneham*, and the tithes thereto belonging, as her agent or servant, to collect and receive for her use the tithes and dues arising from the said rectory, and to let the same, and receive the rents and compositions due for the same; he, the defendant, about the 17th of June, 1736, entered into an agreement with the said *Hulbert* in writing, to pay annually 7*l.* 10*s.* for his tithes of corn and grass, together with the small and privy tithes; that he, the defendant, renewed the same agreement with *Hulbert*, who acted as the plaintiff's agent when he came into the possession thereof; and that he had duly paid for all his tithes according to that composition, and had continued to go on so yearly, at the rate of 8*l.* a year for the same; and therefore he pleaded the said agreement; and he set forth the lands he occupied, and the titheable matters that arose thereon; and insisted, that he ought not to pay them in kind, the said plaintiff not having given him due notice, that he would no longer abide by the said agreement; and he tendered the 4*l.* the half yearly payment then due, which the said *Hulbert* refused to accept, declaring that he would not abide by the said composition, and the bill was upon the hearing dismissed with costs. As to the necessary period of notice 1770, the Exchequer determined in *Walter* v. *Flint* †, that the compositions which the defendant had entered into with the plaintiff for his tithes, ended at Michaelmas. In the January following the plaintiff gave notice, that he would not abide by the composition for the ensuing year; but would have his tithes in kind, or the value thereof, from the Michaelmas preceding. That being refused, he brought his bill for tithes. The court de-

What length of notice requisite to determine a composition.

* 2 Wood, 478. † 3 Gwil. MS. 985.

clared, that the notice given by the plaintiff in January for taking his tithes in kind, did not avoid the yearly composition subsisting at the Michaelmas preceding; and decreed the defendants to account for the current year, according to the said composition.

Case of Dr. Waller upon notices.

The most important case upon notices to determine compositions, is that of Dr. *Waller*, the vicar of Kensington so frequently noticed for this as well as for other purposes. The court of Exchequer whilst Lord C. Baron *Skynner* presided there, had decided that certain notices for determining compositions agreed to by and between Dr. *Waller*, the vicar of Kensington, and some of his parishioners were sufficient. Upon appeal however to the lords, this decretal order of the Exchequer, as far as concerned the notices, was reversed. The reasons on behalf of the appellant, which were signed by Messrs. *Macdonald and Kenyon*, set forth the general grounds of the judgment of the peers on that memorable case. It had been admitted, that the appellants, had under some agreement, paid Dr. *Waller* composition in lieu of their tithes, for every year from *Michaelmas* 1771, to *Michaelmas* 1777, inclusive; therefore, although Dr. *Waller* might have a right to determine the compositions, yet he could not do it without a reasonable notice to the parties. That the notices, which were mentioned in the pleadings to have been given for determining such compositions, and for taking the tithes in kind, unless a new agreement were made with the doctor's real or nominal lessee, were unreasonably too short, and therefore insufficient notices for that purpose. The notices given by the doctor and assignee were three in number; the first was given on the 12th of September, the second between the 20th and 27th, and the third upon the 29th of the same month. All these notices affected to put an end to the composition from the *Michaelmas-day* then next: the interval between the earliest notice and the day, on which it was to take place, was not three weeks. It is established, that a tenancy from year to year, in the case of farms, cannot be determined by a landlord without six months notice prior to the end of the tenant's year; and it was conceived, that tithes have repeatedly been held to stand, in this respect, upon the same footing with corporeal property. It seemed reasonable, that either party intending to put an end to such a composition, and to pay or require payment of tithes in kind, ought to give a longer notice of that intention, particularly so, where the notice was given to the tenant, that he might be the better enabled to adapt the mode of his cultivation to the nature of his tenure. It could not be disputed, but that in the exercise of that

discretion, which every man has a right to exercise, and every prudent man will exercise, as to the mode of agriculture most likely to be beneficial to him, it is of importance to him to know, whether he be to set out his tithes in kind, or to pay a pecuniary compensation in lieu of them; and to conceal an intention to put an end to such composition *(continued uninterruptedly for six years*, under a supposed agreement,) and thereby delude a man into belief, that it is to continue, appears to be an unreasonable and an unfair conduct on the part of the lessor, of which it is presumed a court of equity ought not to permit him to avail himself. It is a fact, that every landlord thinks himself obliged to give a much longer warning to his nursery tenant, when he means to determine his holding, than he does to the common farmer; the usage has certainly been, to give the nurseryman three years notice. If the notices were insufficient, the account ought not to have been directed; Dr. *Waller* and his lessee would then be entitled to the composition only during the litigation, and consequently the respondent's bill would have been dismissed.

After hearing counsel on the following preliminary point, "whether the notice given were a sufficient notice to determine a composition for tithes?" The following question was put to the judges, viz. Whether the notice given on the 8th of *September*, were a sufficient notice to determine a composition for tithes from year to year, such year commencing on the 29th of *September?* Mr. Justice *Gould* delivered the unanimous opinion of the judges present, that such notice was by no means sufficient: whereupon it was *ordered* and *adjudged*, that the decretal order complained of, so far as it related to the first mentioned cause and the present appellants, should be reversed.

Seperate opinions of the Barons on the time of necessary notice.

The opinions of the barons in 1722, were very distinctly given upon what was a reasonable and legal time of notice in *Glass* v. *Caldwall**, where, in a bill for tithes the parson charged, that he had never entered into any agreement with the defendants for their tithes for the current year; but on the contrary insisted, that on or about the 19th day of *December* last, he had caused a notice in writing signed by him, dated the 15th of that month, to be delivered to each of the said defendants to the effect following, *viz.* "That the great and small tithes due to the plaintiff from the "farms, each of the said defendants occupied would be taken in "kind the ensuing year;" That on the 20th day of February

* 3 Wood, 403.

last, he caused another notice, signed by him, to be delivered to each of them, that he intended pursuant to the former notice given in December 1679, to gather in kind all the said defendant's tithes, both great and small, which should arise and become due to him from the farms they severally occupied in 1770; and that they still refused to comply with such notices, and would not set out their tithes, or make him any satisfaction for the same, except the pretended composition.

The counsel for the defendants urged that in *Gulliver* on the demise of *Carter* v. *Burr*, at the assizes in *Kent*, about four or five years before, on a motion for a new trial, the court of King's Bench held, that the same notice was necessary in case of tithes, as in case of lands.

Lord Chief Baron *Parker* observed, that in Bunbury 15 *, it is said by Baron *Price*, that notice may be given before reaping; I am of a different opinion. Hard. 203. Salk. 414. I cannot find, that the court has fixed a precise time: but here the parties knew, that the year ended at *Christmas*. If I were to lay down a rule, I should think *old Michaelmas-day* a proper time. But in this particular case, I think the notice given before the year ended, was sufficient.

Smythe, Baron, of the same opinion. Notice must be given. The question is, when? When the year begins, the composition must continue to the end. In this case the notice was before the year ended. If it be holden, that notice must be given before preparation is made for the corn, it must be given the spring before; for then the land is prepared. This is not like the case of landlord and tenant. The case cited of *Gulliver and Burr*, was a lease of all the tithes of a parish. A tenant should have six months notice to provide himself. But that is not necessary for an occupier retaining his own tithes. The notice in this case is sufficient.

Adams, Baron. Some notice must be given. The question is, how long before the composition of the former year ends? The notice must be reasonable. Supposing the composition equal, it is for mutual benefit, and to prevent taking and setting out the tithe. It seems, that notice any time previous to the ending of the year is sufficient. If you go by any other rule, it must be uncertain. If it were a composition for any particular species of tithe, such as

* Viz. in the case of *Reynel* v. *Rogers*, 1717, in which it was determined, that a composition for all small tithes cannot be determined by a notice to determine as to part, viz. hops.

wheat only, it might make a difference to the occupier, but not, where it is a composition for all tithes.

Perrot, Baron. It has been always the received opinion of this court, that such a reasonable notice should be given, as might determine the farmer how he should cultivate his land. This was always Mr. *Wilbraham's* opinion. *Hardress* referred to by Lord *Holt* in *Salk.* 414, confirms this. I see no difference between a composition for all tithes, or for a particular species of tithe. The time for notice has always been understood to be about *Michaelmas*. Between landlord and tenant the notice must be reasonable: custom has fixed it to six months. Suppose a man to have a modus for some particular land; if he knew his composition was not to continue, he would not sow his wheat on that land.

The court decreed an account with costs.

Lord Thurlow's opinion thereupon.

In 1787, in the case of *Bishop* v. *Chichester*, quoted before for other purposes, Lord Chancellor *Thurlow* thus spoke of the notice necessary to determine compositions; and with reference to the before-mentioned case of Doctor *Waller* or *Adams* v. *Hewitt*, he thought the rules of notice for determining compositions for tithes, were exactly the same as those between lordlord and tenant from year to year: that he always understood the reason, why a defendant, who set up an adverse claim, should not be allowed to object for want of notice, to be, that it was inconsistent for him to say in the same breath, that he does and that he does not hold from year to year; for the necessity of notice arises from that particular species of tenancy, which he disclaims by his other defence; and this principle would equally apply to the case of a composition from year to year; for the composition with the occupier is the same thing, as a lease to a stranger; but that he could not distinguish this from the case of *Hewitt* v. *Adams*, which seemed to have decided the point the other way.

Further opinions upon notices.

Some very important points relative to notices were made in the case of *Atkyns* v. *Lord Willoughby de Brooke and others* *, 1794, although the principal determination in that case were the court's refusal to decree a farm modus rank. *Graham* and *Richards* observed for the plaintiff, that in that case the tenant as well as his landlord had set up an adverse title, a modus, and had therefore agreed to consider themselves as not holding by annual agreement under the rector. Notice is holden necessary by analogy to the case of landlord and tenant from year to year; and their setting

* Anst. 397.

up an adverse title is holden a waiver of notice to quit possession.

Burton and *Steele* for the defendants insisted, that one at least of the defendants, *Goodcheap*, was entitled to the benefit of this composition, being a running contract with the rectors, continued after the plaintiff became rector, and paid to his lessee. That notice was necessary to determine it, notwithstanding the modus set up, as decided in the *Kensington* case, *Adams* v. *Hewitt*, 1782, and *Bishop* v. *Chichester*. 2 Bro. 161.

Graham in reply. The *Kensington* case was, where an actual agreement had been entered into between the clergyman and the parishioners, and they insisted on it as a composition during the incumbency. The court held otherwise, that it was only good from year to year; but that notice was necessary to dissolve it; for that was not a denial of the clergyman's right; it was not an adverse claim; but a claim under him for a longer term.

Macdonald, Chief Baron. I believe the question of notice in that case originated with Lord *Mansfield* in the house of Lords; it had not been taken notice of in this court, nor in argument there.

Graham. In the case of *Bishop* v. *Chichester;* the rector by giving an irregular notice, admitted the necessity of a notice; and probably there had been some agreement between them, or an acceptance of the payment, which supposed an agreement. The law in this respect is expressly founded on the *Kensington* case; Lord *Thurlow* declaring that he decided contrary to what he should have conceived to be the law, as being unable to distinguish it from that case, and bound by it. Then if, in fact, the case of *Bishop* v. *Chichester* were not distinguishable from the *Kensington* case, it has not carried the rule beyond it, and is to be considered merely as a confirmation of it; if it were distinguishable, then the reason of the decision fails, and it is to be considered as a misapplication of the old rule, not as the adoption of a new one. The present clearly is distinguishable from the *Kensington* case; for here the defence set up is a modus, a title paramount and inconsistent with any agreement or composition with the plaintiff; both parties contending, that no agreement exists; then a notice to determine it must be superfluous.

There has been a very recent case, viz. in 1799, in the common pleas, * *Wyburn* v. *Tuck*, in which an assignee of the tithes holden under a lease for years from the dean and chapter of *St. Paul's*,

Case of *Wyburn* v. *Tuck* on notices.

* 1 Bos. and Pul. 458.

recovered a verdict in an action of debt on the 2 and 3 Edw. VI. for not setting out tithes. Three other separate actions were brought by the same plaintiff against different landowners in the parish. Three objections were taken to the verdicts, the second of which affected all the four cases, and was, that a sufficient notice to determine the composition had not been given to the defendants. A rule *nisi* having been obtained for setting aside the several verdicts, which had been found for the plaintiff, and entering nonsuits in all the causes.

Shepherd, Serjeant, now shewed cause. In answer to the 2d objection, it is to be observed, that the case of *Hewitt and others* v. *Adams*, *Dom. Proc.* April 19th, 1782, by which the necessity of a six months notice to determine a composition of tithes was established, proceeded on the analogy between the occupiers of lands paying a composition, and the tenants of lands holding them from year to year. Now, if A. let lands to B. for a term of years, and B. underlet to C. from year to year, A will be entitled to enter upon the lands at the expiration of B's. term, without giving notice to C. So if A. let lands to B. at *Michaelmas*, to hold from year to year, and B. underlet the same to C. at *Lady-day*, to hold in the same manner, it will be sufficient if A. give notice to B. at *Lady-day* to quit at the *Michaelmas* following, without regarding the sub-contract between him and C. In the present case, *Lambley* is to be considered as tenant to the *Jermyn* family from year to year, and the occupiers of the lands, from whom he receives the composition as his undertenants holding in the same manner. The notice, therefore, which was given to *Lambley* by the representatives of *Stephen Jermyn*, must be sufficient to entitle them and those, who claim under them, to take the tithes in kind of the occupier of the lands. If this be not so, and the composition taken by *Lambley* be to bind the *Jermyns*, or those, who claim under them, it may equally be contended, that it shall bind the dean and chapter of St. Paul's, who were the original lessors.

Le Blanc, Serjeant, *contra*, observed, that if a rector having made a composition lease of tithes, and the lessee make no alteration in the composition, when the tithes revert to the rector, the occupiers of land will continue to hold under the composition originally made by the rector, and consequently will be entitled to notice before he can take the tithes in kind. The rules respecting notice to determine a composition, are governed by the analogy to the notice to quit. Thus if the *Jermyns*, having letten land to A. from *Mi-*

chaelmas to *Michaelmas*, had granted a lease at *Lady-day* to B. for a term of years, and A. had continued to pay rent to B. till the expiration of his term, A. would again be tenant from year to year to the *Jermyns*, and would be entitled to notice six months before *Michaelmas*. For though B. might have put an end to the tenancy during his term, yet not having done so, it continues as at first created: if it were not so, that which was originally taken as a tenancy from year to year, beginning at *Michaelmas*, would be put an end to at *Lady-day*. *Eyre*, C. J. With regard to the question of notice, which applies to all these causes, I have the more difficulty in speaking upon it, as I feel myself under the dominion of old prejudices. The judgment of the house of lords, which has been alluded to, was a reversal of a judgment given by the court of Exchequer, and in which I concurred. I am to presume, that the judgment of the house of lords was right, but I am not master of the principles, on which it proceeded. Tithes cannot in my opinion be well compared to land for any purpose, but particularly for the purpose of connecting a composition with the inheritance. It appears to me, that the doctrine of binding the landlord by the interest of the tenant from year to year, was founded on the distribution of land into a variety of interests, as that of the tenant and the reversioner, whereas it will not be found to apply to tithes so distinctly, as to justify our adopting the same rules, as are capable of being adopted with respect to land. In the case of *Hewit and others* v. *Adams*, the defendant insisted in the Exchequer, that they were not at all bound to pay the tithes demanded, and we thought, that where a defendant claims to withhold tithe adversely, all idea of composition must be put out of the case. The analogy between land and tithe, does not appear satisfactory to me. Land is either taken on a holding from *Lady-day* or from *Michaelmas*, or from some other time, and then notice to quit must be given accordingly. But if a composition be to be determined on any just principles, the notice must be given from a period suitable to the nature of the tithes, and with a relation to the manure and cultivation of the land. There must be such a rule, as will enable the tenant to cultivate his land, in the manner most beneficial to himself, accordingly as he is to pay a composition, or to pay in kind. I have great difficulty therefore in understanding on what ground a notice is necessary in the case of tithes, and I cannot at all comprehend, how the owners of the land can be considered parties to a composition made with the occupiers of the land. Tithe in kind, is the thing demised; the com-

position therefore begins with the interest of the tenant, is governed by that interest, and must, I should think, end with it. It has been argued, that there may be a connection between the title of inheritance to the tithes and the composition; if there can be, I submit; it may be a necessary consequence of that judgment, the principles of which I do not understand. As some of my brothers concurred in that judgment, they will probably state, on what ground it is, that a composition may be extended to the case of a new tenant, claiming on the determination of the interest of a former tenant.

Buller, Justice. The second point appears to me to have been fully settled by the decision in the house of lords. That decision was, that the same notice must be given to determine a composition, as must be given to a tenant of land holding from year to year. The other point alluded to by my Lord C. J. was also raised in that case. The landholders contended in the first place, that they were not obliged to pay the tithe claimed; and 2ndly, that if they were, the plaintiff was not entitled to recover, because there had been a previous composition, the notice to determine which, was not sufficient. There was a doubt on the woolsack at that time, whether both, or only one, or which of these questions should be put to the judges. At last the question put was, whether the notice given were sufficient to determine the composition, and the judges were unanimously of opinion that it was not, and said expressly, that a notice to determine a composition for tithes ought to be given with analogy to the notice given in a holding of land. By that decision we are bounden; nor do I think any of the difficulties it has been supposed likely to produce will ever occur. It has been argued, that if the plaintiff, as deriving title from the *Jermyn* family, be bounden by this composition, the *Dean* and *Chapter* of St. *Paul's* will also be bounden by it. That conclusion however is questionable, and may or may not be true according to the circumstances. If the interest of the lessee under the *Dean* and *Chapter*, with whom the composition was made, expire, the *Dean* and *Chapter* will not be bounden. But if a lease be granted for a long term of years, and the *Dean* and *Chapter* take an assignment of it, though as to many purposes, that will operate as a surrender, yet with regard to the interest of third persons it will not. All depends on the single question, whether there be a continuance of that interest, under which the composition was first created? If that continue, the composition continues; if that be at an end, the composition is at an end also. It has been said,

that there may be a difference between a composition with the owner, and a composition with the occupier of the land. If however the interest of the occupier cease, the composition made with him, unless under particular circumstances, will be at an end. But no question of that kind arises here; for it does not appear, but that the occupiers, in all the stages of the case, were the same. The difficulty would be, if we were to suppose a composition to take place from *Michaelmas* with a tenant, who is in on a *Lady-day* bargain. In that case the composition would be either during the interest of the tenant, or from year to year generally. If the former, notice must be given for *Lady-day*; if the latter, a question might be raised, whether the composition should not continue to the end of the year, though the interest of the tenant ceased on the expiration of his lease. That may be a nice question; but it does not arise in this case. There may be difficulties in point of convenience as to the time, at which a composition shall commence, but those difficulties are for the consideration of the parties, when they make their agreement. On the facts of the present case, the composition must be taken to be continuing, inasmuch as the plaintiff claims under those persons, with whom it appears to have been made.

Heath, J. The objection to the plaintiff's recovery, that there was no notice to determine the composition, must prevail; because the title, under which he claims, is derived from *Sperling*, in whose time the composition existed, and has not been dissolved by the parties. In the house of lords the analogy between land and tithes was considered, and the opinion of the judges was founded on the inconvenience, which the occupiers of lands must sustain, if a composition could be put an end to without notice. It was considered, that by notice they would be enabled to cultivate their lands in such a way, as would best answer to them, when called upon to pay tithes in kind, and that it would be very unjust to deprive them of this advantage.

Rooke, J. As the lessees of the tithes under the *Jermyn* family, were desired by them not to raise the composition, it must be considered as having been made with that family. Now, Mrs. *Eyre* and Mrs. *Udney* being the representatives of that family, may by implication be considered, as having also desired, that the composition should not be raised. And though they might have retracted the intimation originally given, yet not having done so, the composition must remain in force, till notice be given to the landholders of an intention to put an end to it. The occupier may be

induced by notice to alter the course of husbandry, and it would be hard to make him liable in a penal action, where that notice has been withholden. On the principles of the decision in the house of lords, and on the general justice of the case, I think a nonsuit should be entered. Rule absolute.

Further proceedings by the common law courts in tithe matters.

Having fully considered several of the actions, which may be brought in the common law courts for the recovery of tithes and the nature of the evidence, which may naturally and commonly does occur in such actions, it will not be irrelevant or unnecessary to consider by and against what persons such actions may be brought, and also some further cases, that have been adjudged as to declarations, pleadings, issues, evidence, verdicts, and judgments thereon.

Whether an husband seised in right of his wife must join her in this action upon the statute.

As if a husband be seized or possessed of tithes in right of his wife, or jointly with his wife, it is commonly holden, that they must join in bringing an action for subtraction of tithes upon this statute*. But yet in one *Babbington's* case, A. D. 1614†, it seems to be admitted, that the action may be brought by the husband alone without joining the wife with him; for as the statute gives the action to the proprietor, the plaintiff needs not set forth his title specially. Yet, according to *Noy*, (136) if the husband die, the wife, and not the executors of the husband, shall bring the action. But if the tithes be once set out, and severed from the nine parts, they then, as before observed, become a chattel vested in the husband, and shall go to his executors‡. And therefore, if after such severance, they be taken by a stranger, the husband alone may bring an action of *trespass*, for taking away his tithes §.

But an action of trespass in such case, lies not against the owner, who set out the tithes ‖; nor may any other action be brought against him (except he be *particeps criminis*,) and if it be, he may plead the special action, in bar of such action ¶.

Effects of a fraudulent severance.

But if after the severance, the owner of the corn himself, or any other by his command, take the tithes away, the husband and wife in such case, may join in an action on the said statute against the owner for not setting out the tithes, notwithstanding they were severed from the nine parts, for that such severance is to be looked

* *Beadles* v. *Sherman*, Moore, 912, A. D. 1597; and *Wentworth* v. *Crisp*, Ibid. A. D. 1593, and more strongly in *Ford* v. *Pomroy*, Noy, 136, A. D. 1608.

† 1 Rol. Rep. 13. ‡ Anon. Ley, 70, A. D. 1623.

§ *Ford* v. *Pomroy*, 2 Brownl. 9, who imports that the wife ought to be joined in the action, because the property is in her, *Noy ut supra*, 136. Jon. 325.

‖ *Leigh* v. *Wood*, 1598. Mo. 912. *Webb* v. *Petts*, Noy, 44.

¶ *Gerard's* case, 4 Leon. 7, 1582.

on as fraudulent, only to evade the law*. Yet it should seem, that the husband in this case, has an election, either to charge the owner of the corn, in an action of trespass at the common law, to be brought by himself alone, for taking away his tithes, after they were severed; or in an action on the statute, to be brought by himself and his wife, for taking away the corn, the tithes not being set out; even as before the statute, in such a case, the party grieved might either have had *trespass* at common law, or sued for the tithes in the spiritual court: yet *quere*, if there be not a difference, where the tithes are immediately taken away by the owner of the corn, after they are severed, and where they are suffered to continue some time upon the land, after such severance; for in the later case it seems, they may be taken or distrained damage-feasant.

Where one is possessed by several titles, one action on this statute suffices.

If one be possessed of tithes by several titles, as where part of them belongs to the parson, and part to the vicar, who severally make leases of their several parts to one person, such lessee may bring one action for the subtraction of these tithes†. And so if the lands, out of which the tithes are demanded, lie in several parishes, yet one action may be brought for the subtracting of them; and the plaintiff needs not set forth how much of the lands lie in one parish, and how much in the other; the action being in nature of an action of trespass grounded upon the wrong, in not observing the said statute.

Not setting forth where the lands lie, fatal if demurred to, cured by verdict.

And yet if the plaintiff in his declaration only say, that the tithes belonged to him, and set not forth in what parish the lands lie, out of which the tithes are demanded, this is fatal, if the defendant demur to the declaration; but if it go to trial, and a verdict be found for the plaintiff, this omission is helped by the verdict ‡, A. D. 1695, it was said in the case of *Strode* v. *Byrt*, that in debt on the statute of Edw. VI. for not setting out tithes, it was sufficient for the plaintiff to declare he was *proprietarius*, without shewing any title; but it was said, he cannot recover without proving his title.

Whether several may join in the action.

Two several persons, who have right to tithes by several titles, cannot join in one action for their subtraction; as the parson and vicar in the case *supra*, cannot join, because they have several titles, though their lessee might, because he has but one title §.

* Noy, 136.

† Vid. before-mentioned case of Sir *Wm. Champernoon* v. *Hill*, 2 Cro. 68. *Fyslew* v. *Kingsford*, 1 Vent. 126, 1673. 2 Leon. 1. Yelv. 53.

‡ Style. 229, A. D. 1650. Banc. sup. *i. e.* B. R.

§ *Campion* v. *Hill*, 1 Brownl. 86, A. D. 1604.

Whether joint tenants and tenants in common must join.

It is said, that joint tenants, or tenants in common of tithes, must join in an action for their subtraction. Yet *quere*, as to tenants in common. For it seems contrary to the resolution in the case before cited. 1 Brown. 86.

Where there are two joint tenants, and they enter and occupy jointly, the action must be brought against them jointly; but if only one enter and occupy, the action must be brought against him, that occupies alone *.

By whom these actions may be brought.

An action upon this statute lies by executors, but not against them. If the action be brought by a parson by plaint, he needs not name himself parson in the *queritur*. For if it appear by the declaration, that he is parson, it is sufficient. But it is said by *Fleming*, justice, that if the action be brought by writ, (i. e. by original) he must name himself parson, although he need not do so, when it is by plaint.

If *qui tam* lie on this statute.

It has been erroneously holden, that an action may be brought, *tam pro domino rege quam pro seipso*, upon the 2 Edw. VI. as in an anonymous case in *Moore* in such action, the judgment was arrested, because it would not lie; an action of debt having been given by the statute †. But it is admitted in *Moore*, 911, that an information in the king's name will lie upon this statute for not setting out of tithes; and accordingly in *Easter* term, 26 Eliz. such an information was brought ‡.

If the owner of the land sell the corn thereon growing, and the vendor by command of the vendee, reap the corn and carry it away without setting out the tithes, the action lies against the owner of the land §. And the action may be against the vendee at the election of the plaintiff.

What facts must be set forth in the declaration.

It is not necessary to set forth in the declaration, by whom the corn was sown, the action being brought against him, who is owner of the corn at the time of reaping; but the time and place, where and when the corn was carried away, must be alledged ‖. And although the severance of the corn be shewn to have been before the sowing thereof, yet because the mentioning the time, when the corn was sown, is superfluous and unnecessary, the declaration is good notwithstanding ¶.

* *Cole* v. *Wilkes*, 1633. Hut. 121.

† Moore, 911. Yet by the case of *Laverld* v. *Owen*, Hetl. 121, A D. 1629, it was holden that an action *qui tam* would lie. *Quære tamen.*

‡ Sav. 62.

§ *Baker's* case, Noy, 152, 1601; and *Hele* v. *Frettenden*, 1 Brownl. 34, 1611.

‖ *Moyle* v. *Ewer*, 2 Cro. 362, 1614.

¶ Deg. 398, *Pellet* v. *Hemworth*, A. D. 1657.

So if the taking away the corn be alledged to be after the defendant's interest in the land is determined, yet it is good, for he continues to be owner of the corn, notwithstanding his interest in the land be determined before it is severed *.

Title needs not be set forth in the declaration.

It is not necessary for the plaintiff in his declaration to make any special title to the tithes, or to shew any deed to maintain his right to them; for the action is but in nature of trespass to recover damages, and to punish the wrong and injury the plaintiff has sustained by taking away his tithes contrary to the statute; and the plaintiff's title is only as an inducement or conveyance to the action; but it is sufficient to pursue the words of the statute, and set forth in the declaration, that the defendant is owner or proprietor of the tithes. But he cannot recover without proving a title: nor is it necessary for the plaintiff to shew, what estate the defendant has in the land, or by what right or title he occupies it; but to say generally, that the defendant is occupier, is sufficient.

Nor the quality nor quantity of the tithes. Otherwise in ejectment.

Nor needs the plaintiff express in the declaration the quantities or loads of corn, &c. that were carried away, nor the kinds of it †. But in an ejectment brought for tithes, the several kinds ought to be set forth. 11 C. 25 b.

In a declaration on this statute the plaintiff set forth, that he was *proprietorius decimarum garbarum et fœni*, &c. And that the defendants did sow certain lands containing so many acres in that parish with grain, and carried the same away, not setting out the tithes; and after verdict for the plaintiff it was moved in arrest of judgment, that *proprietarius decimarum garbarum* was uncertain, and no grain in particular was demanded by the declaration, and therefore it was not good.

What meant by *Garba*.

But it was resolved, that *Garba* in its proper signification is intended of corn: and *Roll* said it had been so adjudged in one *Baxter's* case, upon consultation had with the civilians; where, upon a grant of *decimas garbarum*, the party claimed to have tithe-hay; but agreed, that although the word *garba* in its larger latitude did comprehend any thing, that used to be bundled up, as wood, &c. yet after a verdict, it shall be intended of corn only; and though the demand were of so many acres generally, yet it was holden to to be certain enough, it being mentioned to be sown on a certain number of acres, this action on the statute not being brought to recover the tithes themselves, but damages for them only; and it was also agreed by *Roll*, &c. that the word *grain*, by common

* *Kepping* v. *Swain*, 2 Cro. 324, 1613, and 1 Brownl. 123. S. C.

† 2 Inst. 650. Sir *Hy. Harpar's* case, 11 Co. 25, 1614.

construction, shall be intended corn, and not other seeds not titheable *.

General form of declaration.

It is adviseable in actions brought upon this statute, to declare generally, that the plaintiff is parson, &c. of such a parish, and that the defendant had such tithe within that parish, the single value whereof is so much, which he took and carried away, &c. whereby the action accrues to the plaintiff, according to the form of the statute †.

The plaintiff needs not set forth, that he or the defendant is *subditus domini regis* (although the words of the statute extend only to subjects,) for it shall be so intended; nor needs the plaintiff shew that the tithes were not compounded for before the corn carried away; for that lies on the defendant's part to be made out ‡. But it had been holden 1695, in B. R. § that if it be not alleged in the declaration, that the defendant had not agreed with the parson, it is ill on a demurrer, but good after a verdict.

Where errors fatal, and where not.

Where the plaintiff in an action on this statute, for not setting out the tithe of wood, declared, that the defendant had cut down wood to the value of 200*l.* and demanded 600*l.* as the treble value of the tithes of the said wood; this was adjudged not good; for that the plaintiff of his own shewing, demanded more for tithe than the whole wood was worth ‖.

Yet where the plaintiff declared, that the defendant was occupier of 20 acres of land, *quas quidem præd' thirty acres* he did sow, and carried the corn away without setting out the tithes, there the word *thirty* was holden void; and the declaration was understood of the same twenty acres, which before he was said to be occupier of ¶.

The action upon 2 Edw. VI. not within the statute of limitation.

It is a very material point in the law of tithing, that this action upon the statute of Ed. VI. is not within the statute of limitations; that statute extending to no actions grounded on acts of parliament: and therefore the plaintiff is not confined to the space of six years or any other specific time, within which the action must be brought. It was said by *Twisden* and *Moreton* Justices, in B. R. 1671 **, that *debt for tithes* on the 2 Ed. VI. is out of the statute

* 2 Inst. 650, and Allen, 80, and Style, 103. *Southcote* v. *Southcote*, 1649, and Co. Ent. 162.

† *Lock* v. *Etherington*, 1 Keb. 922, A. D. 1666, and 1 Sid. 265. S. C.

‡ *Owen* v. *Evans*, 2 Keb. 34, A. D. 1667. § *Austin* v. *Burrows*, Comb. 284.

‖ *Man* v. *Somerton*, 1 Browal. 94, A. D. 1607. It was urged that it was but a clerical error, for 2000*l.* one-tenth part of which was 200*l.*

¶ *Fanshaw* v. *Mildmay*, 1 Lev. 97, 1660.

** 2 Keb. 462 and 497, *Hesdel* v. *Harris*.

of limitations. How far the statute of limitations may be effectually pleaded to tithe suits in the courts of equity, will be considered in the ensuing chapter.

Pleas to this action. *Non culpabilis et nil debet.*

As to *pleas* to actions brought upon this statute, we may observe, that the declaration thereon being usually a demand of a debt, or duty due from the defendant to the plaintiff, and vested in him by the said statute, in satisfaction of or recompence for tithes subtracted, the most common and usual plea is *nil debet*, which is a direct answer to, and a denial of the plaintiff's demand.

But the plea of *non culpabilis*, or not guilty, is also holden to be a good plea in this action, that being a denial of the offence, or breach of the law, charged on the defendant, in not setting out the tithes according to the statute; which offence is the ground of the plaintiff's demand *, and both these pleas are the general issue in this action.

Special pleas of moduses, discharge, &c.

It becomes necessary sometimes for the defendant to plead special pleas, as a modus, or other discharge †; and where a parol discharge of tithes for years was pleaded, it was ruled, that such an agreement was determined by bringing the action, and therefore could not be pleaded.

It is not usual to plead such special pleas, nor so safe as the general issue, wherein any discharge of tithes may be given in evidence. And it may also be queried, whether on a special demurrer for that cause, such special plea be good, as amounting only to the general issue.

Notwithstanding so much have already been said of the general nature and effect of evidence, it may be desirable to some, that the particular facts or circumstances, which obviously occur in most actions and tithe suits, to be proved both on the part of the plaintiff and the defendant, should be brought under more peculiar consideration.

What facts a parson must prove.

First then, if the plaintiff be a parson, vicar, or other ecclesiastical person, and claim the tithes in right of the church or benefice, whereof he is incumbent, he is in strictness bounden to prove his institution and induction, and all things else required by law to qualify himself to be incumbent of that church, to which the tithes do belong. But if the plaintiff have been for several years in possession, he is not ordinarily put to prove these matters, unless the

* *Langley* v. *Haynes*, Mo. 302, A. D. 1592, and *Champernowne* v. *Hill*, ibid. 914, A. D. 1604. *Bewtty* v. *Isted*, Hob. 218, A. D. 1617.

† *Bernard* v. *Owen*, 1 Keb. 1662.

defendant in his defence shew some special reasons, why these things ought to be proved and made out.

But the law does not determine how many years the plaintiff ought to be in the possession of his benefice, to excuse him from being put to these proofs; but that seems to be left to the discretion of the judge, who tries the cause.

The law presumes a parson has read the 39 articles.

In a suit for tithes brought in the spiritual court, the defendant pleaded, that the plaintiff being parson, had not read the 39 articles; and the court put the defendant to prove that matter, although it were a negative; whereupon he moved for a prohibition, which was denied; for by *Coke* and *Dodderidge*, the law does presume, that a parson has read the articles, because otherwise, he is to lose his benefice. And when the law presumes the affirmative, then the negative is to be proved *. And so it is said to have been ruled upon evidence at the assizes, that all things requisite to make the defendant complete incumbent, shall be presumed, unless the plaintiff, by some evidence to the contrary, give occasion to the defendant to prove those matters. Yet in ejectment for a rectory, it was insisted on by the defendant's counsel, (after the plaintiff had made proof of his admission, institution, and induction,) that the plaintiff ought to prove his reading and subscribing the 39 articles, and the declaration of his assent to all things contained in the book of common prayer, and that such declaration of his assent was made within the time appointed by the statute; and by the report of the case, the opinion of the court seemed to be, that all these things ought to be proved: but it is there said, that admission, institution, and induction, upon the presentation of an stranger, is sufficient evidence to bar the plaintiff in an ejectment, and to put him to his *quare impedit* †.

Further presumptions.

Both *Coke* and *Dodderidge* said, that if the plaintiff have once a legal title by institution and induction, the other matters appointed by the statute to be afterwards performed by him shall be presumed to have been so performed, although the omission of any of them would make the living void, as a condition subsequent to the plaintiff's title; and therefore the *non-performance* ought to be made out and proved by the defendant.

Negatives to be proved by defendant.

What facts plaintiff must prove.

The plaintiff must also prove, that the lands lie within his parish, and that the corn, &c. growing thereon was carried away;

* *Monke* v. *Butler*, 1 Rol. Rep. 83, A. D. 1614, and Clayt. Rep. 83.

† *Snow* v. *Phtlips*, 1 Sid. 220, A. D. 1665.

and he must also prove the value of the corn, &c. And if the plaintiff be a lessee, must prove his lease; but after a long possession he needs not prove his lease; nor needs he prove what estate his lessor had at the time of the lease made. We have before spoken of the proof of his title.

What defendant must prove.

The defendant must prove, that the tithes were justly set out according to law, and the custom of tithing used within that parish. And if the tithes be once so duly set out, and after that taken away by a stranger, without fraud in the defendant, &c. the defendant, (or owner of the land) shall not be chargeable.

Parol agreement for tithes excuses from the forfeiture.

So the defendant may prove an agreement or composition made with the plaintiff for the tithes, and though it be a parol agreement only, which by law is not sufficient to grant the interest of the tithes, especially for more years than one; yet such a parol agreement is holden good to excuse the defendant from the forfeiture given by the statute *.

Agreement with one shall bind the co-plaintiff.

And if there be two plaintiffs who bring the action, an agreement with one of them only is sufficient, and shall bind his co-plaintiff, and the defendant may prove, that another person has the right to the tithes, to whom he has paid them or compounded for them.

What defendant may prove to resist plaintiff's claim.

The defendant may also prove, that the plaintiff obtained his living by simony, or that he had not read the articles, &c. or that he is guilty of some other act or omission, which makes his benefice void; or he may prove a lease or grant, or other title from the plaintiff, or from some other person, from or under whom the plaintiff claims, who had a right to lease or grant such tithes; and it seems, the defendant may prove, that the benefice is above 8*l. per annum* value, and that the plaintiff has accepted another living without dispensation, contrary to the statute 21 H. VIII. c. 13.

So may the defendant prove a *modus decimandi* or any other discharge of the tithes, or the payment of them according to some special custom, prescription, privilege, unity, &c. And non-payment of tithes, time out of memory, is good evidence of such discharge †.

Copy of bull no evidence.

But if the discharge be by the pope's bull, or composition, a copy of such bull or composition is not evidence without shewing the bull or composition itself ‡.

* *Barnard* v. *Ewens*, Raym. 14, A. D. 1662. S. C. 1 Keb. 21. *Withy* v. *Sanders*, 23 Leon. 1584.

† *Slade* v. *Drake*, Hob. 295, a very special case, A. D. 1617.

‡ *Bret* v. *Ward*, Wynch, 70, A. D. 1623.

Legislative interference to diminish costs of tithe suits.

The remaining considerations, which call for our attention to tithes, as affected by the temporal and not the spiritual courts, are confined to two points, which are in fact special jurisdictions created by statute, and must not therefore be confounded with any common law process, though the judges presiding in the courts, where these statute matters are decided be common law judges, ministers or officers. Although from the extent and produce of the soil subject to the payment of tithes, the whole aggregate fund may be considered as very large, yet when it is known, that the number of parishes in England exceeds 11000, it obviously occurs, that the particular portion of tithes payable to each rector or vicar for his whole parish, and still more the distributive or proportionate share of that portion payable by each parishioner, is comparatively small; the consequence to a reflecting mind is, that the necessary charges and costs of bringing any one point upon tithing into litigation, far exceeds the real value of the rights either insisted upon or resisted. A common evil of such pernicious tendency did not absolutely escape the attention of the legislature. After they had made several large reforming strides in abridging some of the ecclesiastical rights, and secularizing the revenues or tithes of between five and six thousand parishes, (for so many lay impropriations now are there) they found it necessary to extend their care, protection, and tenderness, to the remaining parishes, which they left on the old footing of the civil establishment, which præ-existed those innovations. We find therefore that by the 9th section of the 2 and 3 Edw. VI. it was enacted, that if any person refuse to pay his personal tithes in form aforesaid*, then it shall be lawful to the ordinary of the same diocess, where the party that so ought to pay the said tithes is dwelling, to call the same party before him, and by his discretion to examine him by all lawful and reasonable means, (other than by the party's own corporal oath,) concerning the true payment of the said personal tithes.

But this statute being found ineffectual for the purposes intended, a better provision for the recovery of small tithes, &c. was made by the statute of 7 and 8 Wm. III. c. 6†. whereby a power is given to justices of peace to determine in cases of small tithes; the preamble of which speaks its intent. i. e. *For the more easy and effectual recovery of small tithes, and the value of*

* This has relation to some of the foregoing provisions of the act, which see in the App. No. VI.

† See the act at length, App. No. XXXIII.

them, where the same shall be unduly substracted and detained, where the same do not amount to above the yearly value of 40s. *from any one person.*

This act of Wm. III. for the recovery of small tithes having been made first by way of experiment for 7 years only, the wholesome effects of it were so sensibly felt, that by the 13th of Wm. III. c. 4. it was continued for 11 years, and afterwards made perpetual by 1st Geo. I. 2 sess. c. 6 *. This act was passed chiefly for the benefit of the quakers, whose conscientious scruples checked in some instances their payment of tithes to spiritual ministers. How widely soever some of the dogmatical speculations of this religious assemblage of persons may differ from the tenets of the church of England, and other Christian societies, it must be allowed by every impartial observer, (to the confusion of many,) that the practices of the quakers have kept closer and more constant pace with their theoretical opinions, than those of any other religious society known in this country.

Act of Wm. for recovery of small tithes.

In case of quakers.

From the severe spirit, which prevailed against the quakers in the days of Chas. II. (it is a fashion with some writers to call that reign the golden days of good King Charles,) it manifestly appears, how necessary those legislative provisions were, to ease the consciences and relieve the oppression of harmless, edifying, and therefore, respectable individuals. In the year 1677, whilst Lord *Nottingham* held the seals †, a bill was preferred in chancery against a quaker for tithes, who refused to answer upon oath; the defendant was brought by several orders to the bar, and being indeed a quaker, prayed to answer without oath; and having been brought up three times before, the lord chancellor did admonish him of the peril, that the bill would be taken for true, entirely as it was laid, if he answered not; but defendant saying as before, the chancellor pronounced his decree for the plaintiff, and that the bill be taken *pro confesso*; and he referred the valuation to a master, and to examine what was due, and to be armed with a commission for that purpose.

Severity against the quakers under Ch. II.

And the lord chancellor declared, that this court had a cognizance of matters of tithes, as well as the exchequer; and that the plaintiff had his *choice of the court*; though Sir *John Churchill*, not being of counsel, but *amicus curiæ*, said, that this cause for tithes,

* This act is given at length, App. No. XXXVI.

† Anon. 2 Freem. 27, and 2 Ch. Cas. 237.

especially *small* tithes, was not proper for this court, and had not been used.

Few have been the cases upon these statutes made in ease of the quakers. They are a peaceful brotherhood, averse from warfare and litigation. The case of the *King* v. *Wakefield*, in B. R. in 1758, before Lord *Mansfield**, is instructive and interesting.

Case of quakers, *King* v. *Wakefield*.

Rex v. *Wakefield et al*. Mr. *Harrison* had obtained a rule, in Michaelmas Term, 1755, to shew cause, why an order of two justices made upon *several quakers*, (for payment of tithes under the value of ten pounds to the curate of a chapel) and confirmed at the sessions, upon an appeal from it, should not be quashed, together with the order of sessions confirming it.

Mr. *Norton*, in Michaelmas Term last, (viz. 26th Nov. 1757,) shewed cause. He gave up the order of sessions, as not maintainable; but defended the original order.

To this original order, Mr. *Harrison* had taken four exceptions: which were now supported by him and Mr. *Clayton*. These exceptions were as follow:

1st. It is a joint order made on different persons, for *distinct* non-payments of *different tithes*: whereas there ought to have been a *distinct* order on each. In 1 Strange 471, *Between the Parishes of Chewton and Compton Martin*, the removal of two different families of paupers by one order, was holden bad; though the parishes were the same.

2d, The title is in *question*: therefore the justices have no *jurisdiction*. The exception in the act of 1 Geo. I. stat. 2. c. 6. s. 2. is "*unless* the *titles* of such dues, titles, or payments shall be in "question." And these words, "unless, &c." extend to this whole clause; and are not confined to the granting a *certiorari* only. And this fact, of the title being in question, appeared as Mr. *Harrison* alleged, upon the granting the *certiorari* in the present case.

3d. *Non constat*, that the two justices, who made this original order, are "neither patrons nor interested in the tithes." But 1 Geo. I. c. 6. s. 2. requires, that they shall be neither one nor the other. Now they ought *expressly* to aver and *shew* (negatively) "that they are not:" or else they have no jurisdiction, by the very words of the act: the jurisdiction being given to "any two or "more justices, &c. other than such as, &c."

* 1 Bur. 485. Lord *Mansfield* was known to have entertained personal intimacy and friendship with several quakers, and a high esteem for their whole body.

4th, It does not *sufficiently ascertain and state* what is due and payable by the defendants; or, at least, for *what* the respective sums are due. One sum is "1*s.* 6*d.* being *due to the curate*," not saying *For what*. Another is, "being the value of their ancient customary payments." Another is, "4*s. being ancient customary* payments."

This order was made on the act of 1 Geo. I. stat. 2. c. 6. s. 2. which extends the 7th and 8th W. III. c. 34. s. 4. to all *payments* to ministers or curates officiating in churches or chapels, which extends *only* to tithes and *church rates*.

Mr. *Norton contra* answered these objections. The substance of his defence against them was fully sufficient, if true: for he denied the first to be *material*, and denied the three last to be well-founded.

The matter was adjourned to Monday 28th *November*. Then, this motion being mentioned again,

The court enquired "Whether the return of the *certiorari* "were filed."

And Lord *Mansfield* said, he had called for and read the *affidavits* made for obtaining the *certiorari*, and upon the shewing cause,

Mr. Justice *Denison* mentioned a case of *Rex* v. *Furnes* B. R. H. 6 G. I. upon a *certiorari* to remove an order made upon the act of 7 and 8 W. III. c. 6. for payment of small tithes, where Lord Chief Justice *Pratt* thought, that where the right *was in question*, such cases were never intended to be the subject of that act of parliament. He said, this was only spoken from a note, which he had seen: but it should seem to be right and true *; and the rather, from a case of *Rex* v. *Furnes* being mentioned in 1 Strange 264, where an order for non-payment of small tithes made on 7 and 8 W. III. c. 6. was quashed. Adjourned to the present term.

Lord *Mansfield* now delivered the opinion of the court:

He began with stating the two acts of 7 and 8 W. III. c. 34, (s. 4.) and 1 G. I. stat. 2. c. 6. (s. 2.) The former relates only to great and small *tithes* and *church rates*, and is temporary. The latter makes it perpetual, and extends it to "*any* tithes or rates, "or any customary or other *rights, dues*, or *payments* belonging to "any church or *chapel*, which, of right, by law and custom ought

* It is right and true: at least, says the reporter, I have a MS. note of the same case to the same effect, or stronger; for mine says, "*Per cur.* The design of the sta-"tute was only to give a speedy remedy for small tithes, where the right is agreed."

" to be paid, for the stipend or maintenance of any minister or " curate officiating in any church or chapel." And both acts direct " that the proceedings shall not be removed into any other " court, unless the title shall be in question."

It is upon the *last* act, that the present order was made. A *certiorari* has issued to remove the order into this court; and it came on, upon exceptions to the order. Both sides made very material objections: one side, to the order, for that the justices had no jurisdiction, *because* the title *was* in question: the other, to the *certiorari*; for that no *certiorari* could issue, by the express provision of the act, to remove the proceedings from before the justices into any other court, because the title was not in question.

The act was made in *favour* to, and for the *ease* and *benefit* of quakers, and to save them from troublesome and expensive prosecutions: but it *never meant* that a *mere scruple* of theirs, or an obstinate *withholding* of the tithes should be any hinderance to the matters being determined by the justices of peace. *This* would have frustrated the very intention of the act, which meant to give this jurisdiction to the justices in *that very case*; where the *real right and title* to them should not be in dispute between the parties.

Then his lordship directed the affidavits, on which the *certiorari* was granted to be read.

It was then sworn on the part of the defendants, " That the " defendants controverted *the title* to the tithes before the justices;" and also, " That the title to the tithes *was then* and *at the time* of " making the said affidavit really *in question*."

The justices had notice to shew cause against the *certiorari*. On shewing such cause, five old inhabitants of the chapelry swore by their affidavits " That such customary stipends or payments " *had always been paid* to the curate by the land-holders, *without* any sort of scruple or objection *except* lately *by the* quakers:" and no other persons disputed it. And these five persons also swore, " That they believed them *to be due*; and that the *former owners of* " *these very lands*, (which had been purchased about four years ago " by these quakers,) had paid for *them*, as other persons had in the " said chapelry;" and these quakers purchased the lands as *subject* to such payment.

These were the affidavits, *upon which the certiorari* was granted.

Now if this general allegation " of the quakers *controverting the* " *title*," and the *consequential assertion* " that the title was in " question," (without any further particulars, or shewing at all

upon what foot they controverted the payment) should be esteemed a sufficient ground for removing the orders, it would put a *total* end to these acts of parliament, and *evade* the very design and intention of making them.

For the quakers might pretend, that they were obliged in conscience to refuse or controvert the payment of these demands; and consequently, to question and deny the right to receive them. Now that is the *very thing* the act meant to provide a summary remedy for. The intention was, that in *such* case, the justices should make an order to compel them to pay.

Their affidavits are general, "That they controverted the title, "and that it was really in question."

Whereas by affidavits made by the five old inhabitants, it is very plain, that the *former owners* of these very lands had always paid; and that these quakers, who are the subjects of this order, have no pretence to dispute it, upon any other foot, than their own *general scruple* to pay any demands of this nature; which these acts are, for their own *ease and advantage*, calculated to compel them to do, in a method the most *gentle and convenient for themselves*, (who scruple to pay without compulsion.)

We are all of opinion, as to the merits of the case, that the title is not so controverted, or so in question, as that the justices can be precluded from jurisdiction, or their order be regularly and properly removed into any other court.

And we are all of opinion, that the rule for the *certiorari* having been made absolute, and the return thereto having been filed, ought not now to stand in the way and prevent our coming at the real justice and merits of the case. For if the *certiorari* issued *improvide*, we can order it to be superseded, and the return to be taken off the file.

There have been several instances of this *. One was where an order of two justices was appealed from: and before the time when the appeal should in course have come on at the sessions, a *certiorari* was brought to remove the order; and because the *certiorari* was brought before the time of hearing the appeal was come, the *certiorari* was quashed, and the return taken off the file.

The other was a *certiorari* to remove an indictment from the *Old Bailey:* and it appearing to this court, that they could not give judgment, but that the *session* of *oyer* and *terminer* at the Old Bailey

* I suppose he meant the cases of *Rex* v. *Eliz. Nicholls*, Pasch. 18 Geo. II, B. R, and *Rex* v. *Gevers*, Pas. 28 Geo. II, B. R.

ought to do it; the like method was taken, and it was sent back to the court below, for them to pronounce the judgment. Therefore upon this case we are all of opinion, that the writ of *certiorari* be superseded, *quia improvidè emanavit*, the return taken off the file, and the order remanded.

His Lordship added this hint, to be observed in future cases of this sort, viz. that upon all orders of this kind the great and material point must be, "Whether the title to the tithes were really "in question, or not," and ought to be determined, before the *certiorari* issues.

I shall close this subject of the recovery of small tithes by referring such of my readers as may be interested in receiving or paying them to the appendix, where they will find precedents for the different proceedings under these acts of Wm. and Geo. as well relating to quakers as others *. Had I not already entered so much at large upon tithes payable in *London* †, it would have here been regular to have arrested the reader's attention to this, as to a subordinate or peculiar system of tithing under statute, and of giving redress in temporal courts ‡.

* Appendix, No. LVI. † Vide *antea* from p. 156 to 164, and *alibi passim.*

‡ If any professional gentleman wish to consult other precedents of pleadings upon tithes in the common law courts, besides those already referred to, let him see Coke's Entries, 161, 162, 226, and 450 to 466. Winch's Entries, 598 to 651. Thompson's Entries, 83, 85. Brownl. Rediv. 458. Read's Decl. 158, 163, &c. Brown's Vade Mecum, 243. Mod. Intr. 197. Debt, &c. on stat. Ed. VI. for not setting out or withholding Tithes. Small's Decl. Tit. Prohibitions, *Formulæ bene placitandi*, 2d part, 32 to 37, and *de modo decimandi* in *London*, vide ib. 189, 190, &c. Wentworth's System of Pleading, vol. 6. p. 242 to 305.

BOOK III.—CHAP. III.

Of Tithe Suits in the Temporal Courts of Equity.

General object of the chapter.

MANY observations have been made, many principles discussed, many opinions delivered in the foregoing pages relative to the rules, usages, authority, and jurisdiction of Courts of Equity, which would have found their natural order of digestion in this chapter, had they not been so intimately connected with some proceedings of the spiritual or common law courts, as to render the notice of them necessary to the elucidation of the particular subjects then under contemplation. In this chapter, whilst we aim at avoiding repetition, we shall endeavour to leave no part of the general subject of tithes unattended to, or not fully and satisfactorily illustrated and explained.

Most common law trials on tithes are now directed out of courts of equity.

It has been before observed, that few tithe causes are now instituted in the spiritual courts: consequently few prohibitions issue. The redress, which is now generally sought for in tithe matters from the hand of justice, is applied for either to the chancery or the equity side of the exchequer, and more particularly the latter. The chief part therefore of tithe causes, which now come before juries, are upon cases of issues directed by one or the other of these two courts of equity. When we reflect upon the general system of tithing, particularly when we turn our thoughts to the paucity of instances, in which tithes are demanded and paid in kind, when we couple the common law right of every incumbent to demand his tithes in kind, and throw the burthen of proving moduses or exemptions upon his parishioners, the conclusion is obvious, that more suits and litigations must be instituted for the purpose of ascertaining disputed claims, than for compelling submission to admitted rights. It may be here again not improperly observed, that suits are incalculably multiplied, by the secularization of so large a part of the church fund, and the frequency of farming tithes. Had this portion of the decimal fund remained in the hands of the clergy, and not been converted into lay fees, it is more than presumption, that a tenth part of the tithe causes, which are to be found in our books, would not have existed.

We shall first consider the general jurisdiction of these courts over the subject: then the mode of proceeding by English bill and

answer in these courts, and lastly the general circumstances, in which relief may be sought, and the particular instances, in which it has been granted.

Mr. Hargrave's opinion on the subject.

The learned Mr. *Hargrave*, in one of his notes upon Coke's Commentary on Littleton, says *, "Since Lord *Coke*'s time a third remedy for tithes, where they are of small value, has been given; for by the 7th and 8th W. III. c. 6. tithes under 40*s*. may be recovered in a summary way before two justices of the peace; and by the 7th and 8th W. III. c. 34. which was at first temporary, but is now made perpetual, tithes under ten pounds are made recoverable from quakers in the same way. In *London*, tithes by the 37th H. VIII. c. 12. are recoverable before the lord mayor, with an appeal to the lord chancellor. To these various modes of proceeding for tithes, should be added the equitable remedy by bill either in chancery or the exchequer, both of which courts have long entertained suits for tithes. Formerly, however, the jurisdiction of chancery in this respect was questioned, it being so far from settled in Lord *Coke*'s time, that there are instances of controverting it, even since the Restoration. (1 Freem. 303. 2 Cha. Cas. 237.) But as to the exchequer, tithes are said to have been anciently cognizable there; though this is contradicted by Lord Chancellor *Nottingham*, who dates the origin of the proceeding by English bill, and consequently that court's equitable jurisdiction over tithes, from the statute of H. VIII. erecting the court of augmentation. (Hard. 236. 1 Freem. 303. and 33 H. VIII. c. 39.) This equitable interference of chancery and the exchequer with tithes, is generally considered as merely incidental and collateral; namely, as a consequence of their jurisdiction in account and in enforcing discovery, (3 Blackst. Com. 9th ed. 437.) and the reasons of the appellant in *Whitehead and others* v. *Travis and others*, (Dom. Proc. January 1779.) But some give a broader foundation to this branch of exchequer jurisdiction; and in respect of extra-parochial tithes, which are part of the ancient inheritance of the crown, they insist, that suits for tithes must ever have fallen within the compass of the exchequer's direct and substantive jurisdiction, as a court of revenue. See the case of respondent in the appeal before cited, and Hard. 117. Perhaps it is upon this idea, as well as on account of the greater frequency of suits for tithes in the exchequer, that Lord *Hardwicke* thought that court the proper jurisdiction for them, 3 Atk. 247. Yet, I confess, it seems to

* Co. Lit. 159, note 4.

me that the antiquity of the exchequer jurisdiction in the particular case of extra parochial tithes, is no proof of a jurisdiction as to tithes in general."

Reasons for the jurisdiction of courts of equity.

That part of the appellant's reasons before the lords, to which Mr. *Hargrave* referred in the case of *Whitehead* v. *Travis*, is as follows *: "The claim to tithes is in its nature a legal claim, and a right to tithes a legal right; and in the case of a bill filed in a court of equity by the respondent, a vicar, for the payment of tithes in kind, and the vicar's right being denied by the defendant's answer, and evidence proving, that he never had enjoyed or received the tithes demanded, and he having given no clear evidence of his right thereto, it was submitted by the appellants, that a court of equity (which has no original jurisdiction in matters of tithe, but gives relief in consequence of the account prayed) ought not in the first instance to have decreed in favour of the respondents, and thereby in effect established his right; but ought either to have left him to his remedy at law for the recovery of the tithe of hay, or have directed an issue to try, whether the respondent, as vicar of *Eastham*, were or were not endowed of the said tithe of hay; upon which issue, and a *vivâ voce* examination of the witnesses, the question would certainly be better and more fully discussed and decided, than it could be by the court of exchequer upon the depositions, and when the most material part of the evidence was taken and received, it was impossible, as before mentioned, for the appellants to give it any answer †."

The jurisdiction of chancery over tithes.

The jurisdiction of the court of chancery over tithes was very early acknowledged, for in 1575, in *Windham* v. *Norris* ‡, a demurrer was put in, because the matter concerned tithes, and it was overruled. This, however, proves, that tithe causes were then seldom brought into chancery; for had they frequently occurred there, it never could have entered into the head of any counsel to demur to a bill, merely because it related to tithes. In the before quoted anonymous case from *Freeman*, when Lord *Nottingham*

* 7 Br. P. C. 56.

† Mr. *Barton Fowler* in his practice of the exchequer gives the following reasons, why the court of exchequer has had, and ought to have at all times, the cognisance of tithe suits: viz. the manifest ease and convenience of the suitors, whose rights so frequently depend for proof upon the records of the court, deposited in its various offices, and particularly in the King's Remembrancer's Office, Augmentation Office, and Auditor's Office; these records being more correctly understood by the several persons in whose custody they are intrusted in each department, and who are competent at the same time to produce and interpret them.

‡ Toth. 285.

had observed, that the chancery had cognizance of tithe matters as well as the exchequer, and that the plaintiff had his choice of the courts: Sir *John Churchill* replied, as *amicus curiæ*, that a cause for small tithes was not proper for the court of chancery. This also bespeaks the infrequency of tithe causes then going into that court. And in the before mentioned case of *Travis* v. *Oxton*, Mr. Baron *Hotham* thus stated the original jurisdiction of the court of exchequer: "It has been said, that the court of exchequer has not an original jurisdiction in cases of tithes, but that it is only incidental and collateral as to discovery and account. But it is to be recollected, that there is a marked distinction between the court of chancery and the court of exchequer. The court of exchequer is a court of revenue, as well as a court of equity; and, as a court of revenue, it had always an original jurisdiction over tithes. Tithes were always part of the possessions of the crown; and it is the peculiar duty of this court to protect such property as belongs to the crown. From the earliest reports or records of law, it appears, that the court of exchequer have uniformly exercised this power over tithes: and even were the point problematical, the constant practice of the courts for so many centuries would now warrant the exercise of such immediate and absolute jurisdiction."

Mr. Baron *Hotham*'s opinion on the jurisdiction of the exchequer.

Notwithstanding the legislature have given remedy by action at law for the subtraction of prædial tithes, in the 2d and 3d of Ed. VI. and in *London* have given special remedy in the mayor's court, yet in both cases the court of exchequer entertained bills for the very same object. In *Hale and others* v. *Pronte*, A. D. 1657*, the bill stated, that the plaintiffs, ever since the twenty-fifth of *March*, in the year 1653, had been lawful owners of the rectory impropriate of *North Petherum*, in *Devonshire*, with all tithes and profits thereunto belonging; that time out of mind, all the tithes of corn and grain growing therein, and the titheable places thereof, had been always paid to the rectors and owners thereof in kind, or a composition for the same; and that the defendant had been yearly owner of twenty acres of arable land within the said rectory, and did yearly mow wheat, barley, oats, and other grain, and carried the same away without setting out the tithe thereof regularly. The bill therefore prayed a discovery of the quantity and the value, and that the defendant might be decreed to pay the same.

Bill lies for subtraction of prædial tithes notwithstanding 2 Edw. VI. and the acts giving remedy in London.

The defendant appeared, and put in a demurrer and answer.

And for demurrer he set forth, that between the twenty-fifth of

* 1 Wood 45.

March 1653, and the twenty-fifth of December in the said bill mentioned, he was owner of twenty acres of arable land within the said rectory, sown with wheat, barley, oats, and other grain, and yearly mowed the same, and converted the same to his own use; and that the tithes thereof yearly were worth five pounds; but that he was advised, that the subtraction of prædial tithes by the not setting out of the tithe from the nine parts, and the unequal division thereof, were matters, which might be relieved at law upon the statute 2 and 3 Edw. VI. c. 13; and therefore the plaintiffs ought not to prosecute any suit in equity for the same; the said plaintiffs not having set forth any certain title to the tithes, or shewn how long since their estate therein might have commenced since the subtraction of the said tithes. The defendant also set forth the titheable matters, and denied any fraud in setting out their tithes.

The plaintiffs replied to the answer; the defendant rejoined; and witnesses were examined on both sides.

And upon opening the pleadings, and reading the evidence, and upon full debate,

It was ordered by the court, that the defendant should pay to the plaintiff 7*s.* 6*d.* proved to be due, and detained for tithes complained of by the said bill, and should at all times thereafter duly tithe and set forth the tithe of corn and grain arising, &c. in the said parish, and titheable places thereof by itself, so that the said plaintiffs or their servants might for the future take and carry away the same without any trouble or denial from the said defendant, or any claiming by or under him.

And in *Langham* v. *Baker and others, parishioners of St. Helen's, London* *, 1658, the plaintiff, as farmer of the impropriate rectory of the said church, preferred his bill here against the defendants for paying their tithes in London, according to the decree in statute, the 37 H. VIII. to which the defendants pleaded the said decree, and that the plaintiff had his remedy before the mayor of London by the act of parliament, which settled the decree; and demanded judgment, whether or no this court would take conusance of the latter.

And it was holden clearly, that the court had jurisdiction in this cause; for that it appeared by the very decree itself, and the act of 37 H. VIII. and by *Linwood de Decimis*, that tithes were payable in London before the said act for houses, but the quota was doubt-

* Hard. 116.

ful, which was remedied by the said act and decree; and the act had no negative words; it was not said before the lord mayor of *London*, and not elsewhere: *vide Scudamore's case*, 5 *Jac. cited Ca. Mag. Chart. upon* 2 *Ed. VI.* and tithes were determinable here *ab antiquo*; as appears by 38 Ass. *Selden de decimis*, 4 Ed. IV. and by *Articul. Cleri*, cap. 4. In case of the king and his farmers; the cause followed the person and his privilege; and that case was not to be resembled to cases, where justices of the peace were impowered by act of parliament; and for that cause justices of Oyer and Terminer had nothing to do, nor justices of gaol-delivery; and so *vice versâ*, 11 Rep. Doctor *Foster's* cases. For they have but a limited jurisdiction. And the king's farmer has, in respect of the revenue, the same personal privilege that the king has; and without question the king may sue here. And it was ruled, that the defendants *respondeant ouster*.

A parson may sue in equity for his tithes, be the amount ever so small.

A court of equity will entertain a bill for tithes, be the demand ever so small: for as was before observed, bills are chiefly preferred to ascertain rights: and a decree for ever so small a sum will carry costs. In *Lewis* v. *Griffith* *, 1733, the court of Exchequer decreed, that the appellant should account with and satisfy the respondent, for the value of the tithes of hay of the said meadow, for the years 1729, and 1730: and it was thereby referred to the deputy-remembrancer to take such account, and to make his report with all convenient speed; and the cause was to continue in the paper of causes, to be further heard upon coming in of the said report.

In pursuance of that decree, the deputy, on the 3rd of *February*, 1734, made his report, and thereby certified, that there was due to the respondent from the appellant, for the value of the tithe of hay of the said meadow, for the years 1729, and 1730, the sum of 9*s*. And the cause being heard upon that report, on the 10th of the same month, the court decreed, that the report should be confirmed, and that the appellant should pay the respondent the said 9*s*. reported due, together with the costs of the suit to be taxed; and which were afterwards taxed at the sum of 51*l*. 5*s*. 8*d*.

The appellant, rather than satisfy this demand, appealed from the decree; insisting, that the bill was founded on a supposed fraud in the appellant in concealing his tithes, and praying a discovery and account of the tithes so supposed to be concealed; and the appellant having by his answer denied any concealment, the re-

* 2 Br. P. C. 408.

spondent, in order to entitle himself to any decree upon such a bill, ought to have verified the allegations of it; but which he had not attempted to do. That the appellant having stated the matter of fact, as to the tithe of the meadows, and denied all fraud; and as no fraud had been attempted to be proved upon the commission, or insisted on at the hearing; nothing remained in controversy between the parties, or to be accounted for, but a demand of 3*s.* or 4*s.* for which the respondent might have had, and ought to have taken his remedy in a court of law, and not brought the appellant into a court of equity for a demand so very inconsiderable, as to be beneath the dignity of the court to take any notice of. But supposing the decree proper, there was not the least colour to decree the appellant to account for the tithe hay of the year 1730, which he had actually set out, and which the respondent's agent might have carried away, but would not meddle with; nor was there any evidence, that the hay in question was worth 9*s.* If, however, it really were worth that sum, the decreeing costs, which amounted to 5*l.* 5*s.* 8*d.* was surely a punishment more than equal to the appellant's crime in not paying 9*s.* and especially as he had sworn in his answer, that the respondent never demanded satisfaction. Under these circumstances therefore, it was hoped that the decree would be reversed, and the respondent's bill dismissed with costs.

On the other side it was said, that tithes in kind were due of common right, and no presumption from report only ought to be of any weight to avoid a demand so founded; and though the appellant by his answer had set up a pretence of exemption from tithes, yet he had given no proof of it; nor had he set up any modus or composition in lieu of tithes. That it appeared clearly from the proceedings in the cause, that the appellant controverted the respondent's right to the tithes, and therefore it was proper to sue in a court of equity, in order to ascertain and settle such right. And that the appellant's answer, as to his not disputing the respondent's right, was inconsistent with itself; for though he admitted, that he would have paid tithe for his hay, had he thought the respondent would have required it, yet he did not even submit by his answer to pay any tithe for the same, though the respondent had required it by his bill.

After hearing counsel on this appeal, it was ordered and adjudged, that the same should be dismissed, and the decree therein complained of, affirmed. Yet in *Griffith* v. *Williams* *, A. D.

Court once refused to entertain a bill for 3*d.* as vexatious.

* 2 Gwil. MS. 549.

1695, it appearing to the court of Exchequer, that the defendant had paid all his tithes except for six calves, for each of which by custom, only a halfpenny was due, (the custom not being questioned,) the court dismissed the bill as vexatious.

General manner of proceeding by English bill.

Having heretofore submitted to the reader some general ideas of the nature of the process in tithe suits, or causes in the spiritual and common law courts, it remains for us, to offer to him the like general ideas of the modes and forms of proceeding in tithe causes by English bill and answer in the courts of equity. For this purpose, suffice it briefly to remark, that the method of instituting a suit for tithes in a court of equity is, as in most other suits, by preferring a bill to the equitable jurisdiction of the court, (that is of the chancery or exchequer,) stating the circumstances of the injury complained of, and praying such relief as the nature of the case may require. Such a bill answers to the declaration at common law, and to the libel of the civil law, and it prays the decree of the court, touching the right claimed by the person exhibiting the bill, in opposition to rights claimed or resisted by the person against whom the bill is exhibited; it consists of nine distinct parts.

Different parts of the bill.

1. The direction or address of the bill, which, if exhibited in the court of chancery, is to the Lord Chancellor, or other person holding the custody of the great seal; and if in the court of Exchequer, to the treasurer, chancellor, and barons of that court.

2. The introduction; containing the names and descriptions of the persons exhibiting the bill.

3. The premises, or, as more usually stiled, the stating part of the bill, which contains the circumstances of the complainant's case.

4. The confederating part, alleging that the defendants combine and confederate together, in order to defraud the plaintiff of his rights.

5. The charging part, in which the complainant alleges the defendant to have preferred certain excuses for delaying compliance with his demands, and charges matter to shew the insufficiency of those excuses.

6. The clause of jurisdiction, which, in order to induce the court to take cognizance of the suit, avers, that the plaintiff can have no relief but in a court of equity.

7. The interrogating part, questioning the defendant as to the truth of the several charges in the bill.

8. The prayer of relief, framed agreeably to the nature of the plaintiff's case.

9. The prayer of process, which sometimes prays a writ of injunction, and always the writ of subpœnâ against the defendant, requiring him to appear in court, and answer the matters alleged against him. In order that the reader may better comprehend the particular purport and use of these several parts, the forms of an original bill for tithes in chancery, and in the exchequer, are given in the appendix *.

Some general observations naturally occur upon the nature and forms of English bills in the courts of equity for tithes, which indeed occur also in most other bills †. It is material, that the description and place of abode of the plaintiff should be set forth in the bill, that the defendant may know where to apply to him should he be disposed to accede to his demands, or should it be necessary to resort to him for the payment of costs, in compliance with any order or process of the court, which may issue against him during the progress of the suit. It may be observed, that to a bill exhibited in the court of Exchequer, after the description of the plaintiff, are added the words "debtor and accountant to his "majesty, as by the records of this honourable court, and otherwise, "it doth and may appear," the use of which words is to give the court cognizance of the suit; to understand which, the reader must recollect, that the court of Exchequer was originally constituted for the sole purpose of recovering the king's revenue; and that, by the common law, every man was permitted to sue another in that court, in which he himself was bounden to attend. By this allegation, therefore, (the truth of which the benignity of the court never suffers to be questioned,) the plaintiff becomes entitled to institute his suit. Every person must be a party, who is at all interested in the event of the suit, that the court may be able to settle the rights of all parties, and make a complete definitive decree upon the matters in question.

How bill to be drawn.

The plaintiff's case must here be stated explicitly and fully, but yet with as much conciseness, as is consistent with perfect intelligibility. If it be extended to an unnecessary length, by the introduction of circumstances, either totally irrelevant, or not material to the merits of the question; or by the recital of deeds, &c.

* Vide App. No. LVII.

† Mitford's pleadings, passim. Prax. Alm. Cur. Can 546, and alibi. Fowl. Exch. Pract. Harrison's Ch. Prac. Barton's Hist. Treat: of a suit in Equity. Hind's Pract. Pract. Register by Wyatt.

in hæc verba, when the substance would have been sufficient, the court, upon application, will order the superfluous matter to be expunged, as occasioning unnecessary expence to the parties, in taking copies of the proceedings. If, on the other hand, it be too briefly stated, to be clearly intelligible, or if circumstances material to be stated, be omitted, the bill may be demurred to, as insufficient to give the court such complete possession of the merits of the case, as would enable it to do effectual justice to the parties.

Charge of confederacy.

The charge of confederacy, though universally inserted in bills, is perhaps in fact useless: it is said to have arisen from an idea, that, without such a charge, parties could not be added to a bill by amendment; and to be inserted, with a view to give the court jurisdiction.

Peers not charged with confederacy.

In the case of a peer the charge of combination is omitted: either out of respect to the peerage, or, perhaps, from an apprehension, that such a charge might be construed into a breach of privilege.

Why fictitious charges sometimes made.

If the plaintiff can foresee the matter, which the defendant will set up to protect himself against the charges of the bill, it is usual to introduce such matter, by mode of allegation, which affords him an opportunity of rebutting its effects, by charging facts of an opposite tendency.

It is sometimes also used for the purpose of discovering the nature of the defendant's case; or to put in issue some matter, which the plaintiff does not chuse to admit; for which latter purpose these fictitious pretences of the defendant, with the contrary averments of the plaintiff, are holden to be sufficient. But it is, in general, discretionary in the plaintiff's counsel, either to allege these pretences, or to interrogate the defendant specially as to the facts they assume.

The common averment of the plaintiff's having only relief in equity.

Such facts as are within the plaintiff's knowledge, and are essential for the purpose of establishing his claim, should be distinctly and positively charged; but those, which are supposed to be within the defendant's knowledge, being part of the discovery prayed by the bill, it is sufficient to state in general terms. The averment, that the plaintiff is relievable only in equity, probably was originally intended to give the court jurisdiction of the cause; but as in truth no assertion of this kind will of itself induce the court to take cognizance of a case, which does not come properly within its customary and established jurisdiction, it may like the clause of confederacy be now in fact useless, though still retained. But in order to entitle the plaintiff to the assistance of a

court of equity, it is strictly necessary, that he make out such a case by his bill, as does in fact authorize the court to take cognizance of the suit. Where the case requires it, in lieu of the word *corporal oaths*, are inserted in the case of a *peer* or lord of parliament, the words "*upon his personal honour*;" and if an aggregate corporation be defendant, "*under the common seal of the said corporation.*"

The interrogating part of a bill.

One of the principal objects of a suit in equity, being to obtain from the defendant a confession of the facts necessary to support the plaintiff's case, the bill requires a full and perfect answer to all the charges and matters therein contained. It is usual to point specific interrogatories respecting each particular fact material to be answered; and the better to guard against evasion, to direct them not only to the substantive facts, but to every circumstance, which by possibility might have accompanied them: but it is to be observed, that as the reason of introducing these interrogatories, was for the purpose of obtaining a full and sufficient answer to the charges of the bill, no other are proper to be inserted than such, as expressly refer to some previous matter contained in the bill.

Prayer of the bill.

The prayer for the particular relief, to which the plaintiff thinks himself entitled, though always inserted, seems, in general, to be unnecessary; for though you pray general relief only by your bill, you may at the bar pray such particular relief as is agreeable to the case made by your bill. It is to be observed, however, that whether particular or general relief be prayed, such relief only will be granted as is warranted by the *case made out by the bill.*

Subpœna to appear and answer.

When the complainant's bill, which must be signed by counsel, has been filed, the writ of *subpœna** issues out of the law side of the court, requiring the defendant (as prayed in the bill) to appear and answer the charges alledged against him†. If the defendant be a peer or peeress, or a lord of parliament, instead of a *subpœna*, a letter missive is sent to them under the signature of the court‡. These *letters missive*, however, are no process of the court; but mere complimentary notices, which the defendant may attend to or not at his pleasure. If he appear it is well, but if not, a *subpœna* must be issued against him as in common cases.

Letters missive.

The *subpœna* having been properly served on the defendant §,

* This answers to the citation in the spiritual courts of which we spoke, p. 240.

† Vide the forms of them both in chancery and exchequer, App. No. LVIII.

‡ For their forms both in chancery and exchequer, vide App. No. LIX.

§ The method prescribed by the practice of the courts for the service of the *subpœna*,

he is bounden to appear and answer the charges alledged against him by the plaintiff's bill, within the time limited by the course of the court; or compulsory process will be awarded against him for contempt, in neglecting the requisition of the *subpœna*.

Attachments. The first process of this kind is an *attachment*, which is in the nature of a *capias* at common law; and is directed to the sheriff, commanding him to *attach*, or take up the person of the defendant, and bring him into court *.

Sheriff's return to attachment. Upon these writs the sheriff returns either *cepi corpus*, or *non est inventus*. If the defendant be apprehended, he is detained in custody till he enter his appearance, and put in his answer to the complainant's bill; or on refusal, an *habeas corpus* is awarded, commanding the sheriff to bring him into court, or a messenger of the court is dispatched for the purpose. But in the exchequer, there is a rule given of four days to bring in the body, that the defendant may do it at his own charge if he please, by an *habeas corpus* purchased by himself; and if he do not remove himself within those four days, then a messenger will be awarded upon motion; and this is by a particular prerogative of the court of Exchequer, that the plaintiff, who is the king's debtor, may not be delayed.

Defendant refusing in chancery, brought up by *habeas* or messenger.

In exchequer by habeas in four days.

Attachment with proclamation. But if the sheriff return *non est inventus*, an additional process is awarded against the defendant, an *attachment with proclamation*, which besides the orderly form of attachment, directs the sheriff to cause public proclamations to be made throughout the county, to summon the defendant, on his allegiance personally to appear and answer the charges brought against him †.

Commission of rebellion. Should this writ also be returned with a *non est inventus*, and the defendant still remain in contempt, a *commission of rebellion* is awarded against him for not obeying the king's proclamations, according to his allegiance.

is by leaving the body of the writ, if there be but one defendant, either with the party himself, or at his usual place of residence; but if there be more than one defendant, the *label* only of the writ is given to those, who are at first served, and the body reserved for the last defendant; the reason of this is, that the body of the writ may be shewn to the several other defendants, to whom the *labels* are given, as they are not obliged to pay obedience to the *label*, unless the writ itself under the seal of the court, be at the same time shewn them. If the defendant be a member of parliament, it is the practice to accompany the *subpœna* with a copy of the bill, which must be signed by one of the six clerks of the court. If a party abscond, on application to the court and affidavit of the fact, the court will order the service of the *subpœna* on the clerk in court, or his solicitor or attorney, and sometimes to another co-defendant, to be good service on the party absconding.

* Vide the forms of attachment both in chancery and exchequer, App. No. LX.

† Vide the forms of attachment with proclamations in both courts, App. No. LXI.

This commission is usually directed to four commissioners therein named, who are jointly and severally commanded to attach the defendant, wherever he may be found within the kingdom of *Great Britain*, "as a rebel and contemner of the king's laws and government, by refusing to attend his sovereign, when thereunto required *."

If *non est inventus* be returned upon the commission of rebellion, the court dispatches a serjeant at arms † in search of the defendant: this is ordered on motion to the court, grounded on the return of the commission of rebellion. Serjeant at arms.

If the defendant be taken on any such compulsory process, he is committed to the Fleet or other prison, till he enter his appearance according to the forms of the court; and also clear his comtempt, by payment of the costs incurred by his contumacious behaviour. But if he likewise elude the search of the serjeant at arms, a *sequestration* issues ‡. This, like the commission of rebellion, is awarded on motion, grounded on the return of the serjeant at arms; and is directed to certain commissioners therein named, authorizing and commanding them to possess themselves of all his personal estate whatsoever, and the rents and profits of his real estates, until satisfaction be made of the plaintiff's demands, and the court shall further order §. Sequestration.

The sequestration is personally served on the tenants by two of the commissioners, which is considered as a seizing and sequestering under the authority of the writ. An order is then procured for the tenants to attorn to the commissioners, who are amenable to the court for the rents and profits. This order is also personally served. Should the execution of the writ be forcibly obstructed, a *writ of assistance* ‖ may be sued out, directed to the sheriff of the county, &c. commanding him to assist the said commissioners in such execution. Writ of assistance.

Any such process to compel appearance to the plaintiff's bill, would be ineffectual against a *corporation*; which being invi- Distringas to corporations.

* Vide the form of a commission of rebellion, App. No. LXII.

† The serjeant at arms is an office of the court of chancery, granted for life, by patent from the king. His office is to attend upon the person holding the custody of the great seal, and to execute the orders of the court against those, who, in any respect, contemn its jurisdiction. A similar officer, likewise, and under the same name, attends upon the equity side of the exchequer.

‡ This writ, though the *last* process against common persons, is the *first* against peers, lords of parliament, (and their servants) and members of the house of commons, who are not subject to arrest.

§ Vide form of a sequestration, App. No. LXIII.

‖ See form of a writ of assistance, App. No. LXIV.

sible, and existing only in intendment and consideration of law, cannot be served with any personal process. The method, therefore, of inforcing appearance from a corporation, is by a *distringas* awarded against their lands and tenements, and directed to the sheriff of the county, or place, where such corporate body is resident.*

Effects of sequestration.

If after the issuing of the *distringas*, the corporation continue in contempt, then issues *an alias* and a *pluries distringas*; and lastly the sequestration issues against their lands, &c. After order is obtained for a sequestration against the defendant, the complainant's bill is taken *pro confesso*, and a decree made accordingly; and the sequestrators proceed under the controul and authority of the court, actually to sequester the estates of the defendant, agreeably to the tenor of the writ, in order to make satisfaction to the plaintiff for the injuries complained of in his bill. This writ of sequestration, therefore, as Sir *William Blackstone* remarks, since it never issues till after the plaintiff has obtained a decree on confession, seems rather intended to enforce the performance of the decree of the court, than to be in the nature of process to bring in the defendant; and it is the only remedy by the constitution of our courts of equity, that a plaintiff has, in case the defendant absolutely refuse to appear; for unless he come in and contest the suit, the court has no authority to investigate the merits of the subject, nor can there be any proof against an absent person.

When defendant must answer.

As the bill calls upon the defendant to answer the several charges it contains, he must do so; unless he can dispute the right of the plaintiff to compel such an answer, either from some impropriety in requiring the discovery sought by the bill, or from some objection to the proceeding, to which the discovery is proposed to be assistant; or unless by disclaiming all right to the matters in question, by the bill he shew a further answer from him to be unnecessary †.

General Grounds of defence to a bill.

The grounds, on which defence may be made to a bill, either by answer, or by disputing the right of the plaintiff to compel the answer, which the bill requires, are various. The subject of the suit may not be within the jurisdiction of a court of equity ‡; or some other court of equity may have the proper jurisdiction: the plaintiff may not be entitled to sue, by reason of some per-

* See the form of a distringas, App. No. LXV.

† In some cases, a defendant may be compelled to answer, though he have no interest in the matters in question.

‡ We have seen that both the chancery and exchequer have jurisdiction over tithes.

sonal disability: if he have no such disability, he may not be the person he pretends to be: he may have no interest in the subject: or if he have an interest, he may have no right to call upon the defendant concerning it: the defendant may not be the person he is alledged to be by the bill: or he may not have that interest in the subject, which can make him liable to the claims of the plaintiff: and, finally, if the matter be such, as a court of equity ought to interfere in, and no other court of equity has the proper jurisdiction, if the plaintiff be under no personal disability, if he be the person he pretends to be, and have a claim of interest in the subject, and a right to call upon the defendant concerning it, if the defendant be the person he is alledged to be; and claim an interest in the subject, which may make him liable to the demands of the plaintiff; still the plaintiff may not be entitled, in the whole or in part to the relief or assistance he prays: or if he be so entitled, the defendant may also have rights in the subject, which may require the attention of the court, and call for its interference to adjust the rights of all parties; the effecting complete justice, and finally determining, as far as possible, all questions concerning the subject, being the constant aim of courts of equity. Some of these grounds may extend only to entitle the defendant to dispute the plaintiff's claim to the relief prayed by the bill, and may not be sufficient to protect him from making the discovery sought by it; and where there is no ground for disputing the right of the plaintiff to the relief prayed, or if no relief be prayed, yet if there be any impropriety in requiring the discovery sought by the bill, or if the discovery can answer no purpose, the impropriety or immateriality of the discovery may protect the defendant from making it.

The defence, which may be made on these several grounds, may be founded on matter apparent on the bill, or on a defect either in its frame, or in the case made by it, and may on the foundation of the bill itself demand the judgment of the court, whether the defendant shall be compelled to make any answer to the bill, and consequently whether the suit shall proceed; or it may be founded on matter not apparent on the bill, but stated in the defence, and may on the matter so offered demand the judgment of the court, whether the defendant shall be compelled to make any other answer to the bill, and consequently whether the suit shall proceed, except to try the truth of the matter so offered; or it may be founded on matter in the bill, or on further matter offered, or on both, and submit to the judgment of the court on the whole case

made on both sides; and it may be more complex, and apply several defences differently founded to distinct parts of the bill.

The form of making defence varies according to the foundation, on which it is made, and the extent in which it submits to the judgment of the court. If it rest on the bill and, upon matter therein apparent, it demands the judgment of the court, whether the suit shall proceed at all, and is termed a *demurrer*. If on the foundation of new matter offered, it demand the judgment of the court whether the defendant shall be compelled to answer further, it assumes a different form, and is termed a *plea*. If it submit to answer generally the charges in the bill, demanding the judgment of the court, on the whole case made on both sides, it is offered in a shape still different, and is simply called an *answer*. If the defendant disclaim all interest in the matters in question by the bill, his answer to the complaint made is again varied in form, and is termed a *disclaimer*. And all these several forms of defence, and *disclaimer*, or any of them, may be used together, if applying to separate and distinct parts of the bill.

Demurrer.

Plea.

Answer.

Disclaimer.

What a demurrer is.

A *demurrer* being founded on the bill itself, necessarily admits the truth of the facts, contained in the bill, or in the part of the bill, to which it extends; and therefore as no fact can be in question between the parties, the court may immediately proceed to pronounce its definitive judgment on the *demurrer*; which, if favourable to the defendant, puts an end to so much of the suit, as the *demurrer* extends to. A demurrer, if allowed, consequently prevents any further proceeding *.

What a plea is.

† A plea is also intended to prevent further proceedings at large, by resting on some point founded on matter stated in the plea; and as it rests on that point merely, it admits, for the purposes of the plea, the truth of the facts contained in the bill, so far as they are not controverted by facts stated in the plea. Upon the sufficiency of this defence the court will also give immediate judgment, supposing the facts stated in it to be true; but the judgment, if favourable to the defendant, is not definitive; for the truth of the plea may be denied by the plaintiff by a replication, and the

Replication.

* An amendment of a bill has been permitted by a court of equity after a demurrer to the whole bill had been allowed; but this seems not to have been strictly regular, 2 P. Williams, 300. *Demurrers* have, however, been lately frequently allowed by Lord *Eldon*, with leave to amend the bill demurred to *in toto*. As in *Whitelock* v. *Sydenham*, *Linc.-inn Hall* sittings after *Trin.* 1804, and in *M'Mahon* v. *Sissons*, at same sittings. The form of demurrers may be seen App. No. LXVI.

† Vide form of a demurrer, App. No. LXVII.

parties may then proceed to examine witnesses, the one to prove and the other to disprove the facts stated in the plea *. The replication in this case concludes the pleadings; though if the truth of the plea be not supported, further proceedings may be had, which will be noticed hereafter.

What an answer is.

An answer † generally controverts the facts stated in the bill, or some of them, and states other facts, to shew the rights of the defendant in the subject of the suit; but sometimes it admits the truth of the case made by the bill, and either with or without stating additional facts, submits the questions arising upon the case thus made to the judgment of the court. If an answer admit the facts stated in the bill, or such as are material to the plaintiff's case, and state no new facts, or such only as the plaintiff is willing to admit, no further pleading is necessary; the answer is considered as true, and the court will decide upon it. But if the answer do not admit all the facts in the bill material to the plaintiff's case, or if it state any fact, which the plaintiff is not disposed to admit, the truth of the answer or of any part of it may be denied, and the sufficiency of the bill to ground the plaintiff's title to the relief he prays may be asserted by a replication, which in this case also concludes the pleadings according to the present practice of the court. If a demurrer or plea be over-ruled upon argument, the defendant must make a new defence. This he cannot do by a second *demurrer* of the same extent, after one demurrer has been over-ruled; for although by a standing order of the court a cause of demurrer must be set forth in the pleading, yet if that be over-ruled, and other cause appearing on the bill, may be offered on argument of the demurrer, and if valid, will be allowed; the rule of the court affecting only the costs. But after a demurrer has been over-ruled, new defence may be made by a demurrer less extended, or by plea, or answer; and after a plea has been over-ruled, defence may be made by demurrer, by a new plea, or by an answer: and the proceedings upon the new defence will be the same, as if it had been originally made.

What a disclaimer is.

A *disclaimer* ‡ neither asserting any fact, nor denying any right sought by the bill, admits of no farther pleading. If the sole object of a suit be to obtain a discovery, there can be no proceeding beyond an answer, by which the discovery is obtained. A suit which only seeks to remove a cause from an inferior court of

* See the form of a replication, App. No. LXVIII.

† See the general form of an *answer*, App. No. LXIX.

‡ See the form of a *disclaimer*, App. No. LXX.

equity does not require any defence, and consequently there can be no pleading beyond the bill.

Defence must be made within a limited time.

When the defendant has once appeared to the complainant's bill, (whether with or without compulsory process is immaterial,) he is then by the practice of both courts to put himself completely on his defence by some of the before-mentioned means within a limited time *. In tithe as well as in other causes, it may become necessary for a defendant in order to preserve or ascertain his rights to file a *cross* bill: and for the complainant to file an *amended* or *supplemental* bill: and for his representative to file a bill of *revivor*. Were the object of this work to present to the reader a complete system of pleading in equity, it would be now premature to consider the natures of these several bills, the use and application, of which can alone arise in some more forward stage of the suit. Suffice it however, for the purpose of conveying some elementary notions of a tithe suit in equity, to non-professional gentlemen, and fitting their minds to comprehend the full force and effect of the adjudged cases, here to submit one general explanatory observation upon each.

What a cross bill is.

1. A *cross* bill is exhibited by the defendant in a former bill against the plaintiff in the same bill, touching some matter in the first bill; and is for the purpose of controverting, suspending, avoiding, or carrying into execution a judgment of the court, or of obtaining the benefit of a suit, which the plaintiff is not entitled to add to, or continue for the purpose of supplying any defects in it. Such cross bills have been generally considered under the head of bills in the nature of *original* bills, though occasioned by or seeking the benefit of former bills.

Amended bill.

2. A bill may be amended before or after appearance and answer, new and parties, if necessary, may be added even after publi-

* This in *both* courts is eight days, exclusive of the day of appearance; but if the defendant cannot complete his defence within that time, the court, upon application, will grant him such further time as may be requisite: and by the indiscriminate indulgence of the court, he is now in all cases entitled, as of course, to the allowance of three applications; the first for six weeks, the second for a month, and the third for three weeks, if he reside beyond the range of the court, (which in chancery is now 80, though formerly but 10 miles, and in the exchequer 15;) and if he reside within those distances, the time allowed him on each application is a month for the first, three weeks for the second, and a fortnight for the third: but if he require still further time, the court will require to be satisfied of the necessity of such unusual indulgence, and generally obliges him to enter an appearance with the register in six days, "thereby consenting that the serjeant at arms attending the court, shall go against him as in a commission of rebellion returned *non est inventus*, in case he do not put in his defence within the time limited by the order.

cation passed; for if the plaintiff perceive by the answer of the defendant, that his bill is in any respect defective, as for want of parties, or otherwise, he may before *replication*, obtain leave (as of course) to amend it. An *amended bill* must state so much of the original bill as may be necessary to introduce the amendments; if it do more, the redundancies will be deemed impertinent. The amended and original bills are, to most purposes, considered as but one bill, and make up the same record; and the defendant, having once appeared, needs not be served with a fresh subpœna.

Supplemental bill.

3. A *supplemental bill* is of the like nature, but of a more comprehensive effect, than an amended bill, and the court will not permit a *supplemental* bill to be filed, for attaining an end, which may be attained by amending the original bill. Thus a supplemental bill may be filed to obtain a farther discovery from a defendant, to put new matter in issue, or to add parties, where the proceedings are in such a state, that the original bill cannot be amended for the purpose. And this may be done as well after as before a decree; and the bill may be either in aid of the decree, that it may be carried fully into execution, or that proper directions may be given upon some matter omitted in the original bill, or not put in issue by it or by the defence made to it; or to bring formal parties before the court: or it may be used as a ground to impeach the decree, which in the peculiar case of a supplemental bill is in the nature of a bill of review. Where any event happens subsequent to the time of filing an original bill *, which gives a new interest in the matter in dispute to any person not a party to the bill, as the birth of a tenant in tail; or a new interest to a party, as the happening of some other contingency; the defect may be supplied by a bill, which is usually called a supplemental bill, and is in fact merely so with respect to the rest of the suit, though with respect to its immediate object, and against any new party, it has in some degree the effect of an original bill. If any event happen, which occasions any alteration in the interest of any of the parties to a suit, and do not deprive a plaintiff suing in his own right of his whole interest in the subject; as in the case of a mortgage or other partial changing of interest; or if a plaintiff suing in his own right be entirely deprived of his interest, but he is not the sole plaintiff; the defect arising from this event may be supplied by a bill of the same kind, which is likewise commonly termed, and in some respects, a supplemental bill merely, though in other

* 1 Atk. 291. 3 Atk. 217.

respects, and especially against any new party, it have also in some degree the effect of an original bill. In all these cases the parties to the suit are able to proceed in it to a certain extent, though from the defect arising from the event subsequent to the filing of the original bill, the proceedings are not sufficient to attain their full object *.

A bill of revivor.

4. A bill of *revivor* must state the original bill and the several proceedings thereon, and the abatement; it must shew a title to revive, and charge that the cause ought to be revived, and stand in the same condition with respect to the parties in the bill of revivor, as it was with respect to the parties to the original bill at the time the abatement happened; and it must pray, that the suit be revived accordingly. It may be likewise necessary to pray, that the defendant may answer the bill of revivor, as in the case of a requisite admission of assets, by the representative of a deceased party. In this case if the defendant admit assets, the cause may proceed against him upon an order of revivor merely; but if he do not make that admission, the cause must be heard for the purpose of obtaining the necessary accounts of the estates of the deceased party to answer the demands made against it by the suit; and the prayer of the bill, therefore, in such case usually is, not only, that the suit may be revived, but also that in case the defendant shall not admit assets to answer the purposes of the suit, those accounts may be taken; and so far the bill is in the nature of an original bill. If a defendant to an original bill die before putting in an answer, or after an answer, to which exceptions have been taken, or after an amendment of the bill, to which no answer has been given, the bill of revivor, though requiring in itself no answer, must pray, that the person, against whom it seeks to revive the suit may answer the original bill, or so much of it as the exceptions taken to the answer of the former defendant extend to, or the amendment remaining unanswered. Upon a bill of *revivor* the defendants must answer in eight days after appearance, and submit, that the suit shall be revived, or shew cause to the

* A supplemental bill after reciting the original bill, and the proceedings, which have been had upon it; the circumstances, which render the supplemental matter necessary, and the respect, in which the state of the cause and of the parties is varied by such circumstance, proceeds. "To the end, therefore, that the said A. B. and C. D. may "severally answer all and every the matters and things herein before charged by way of "supplement, and that they may discover and set forth, &c. And that your orator may "be relieved in the premises, as the nature and circumstances of his case may require. "May it please your lordship to grant *subpœna*, &c. (as in the original bill.)"

contrary; and, in default, unless the defendant have obtained an order for farther time to answer, the suit may be revived without answer, by an order made upon motion, as a matter of course. The ground for this is an allegation, that the time allowed the defendant to answer by the course of the court is expired, and that no answer is put in: it is therefore presumed, that the defendant can shew no cause against reviving the suit in the manner prayed by the bill. An order to revive may also be obtained in like manner, if the defendant put in an answer submitting to the revivor, or even without that submission, if he shew no cause against the revivor. Though the suit be revived of course in default of the defendant's answer within eight days, he must yet put in an answer if the bill require it; as if the bill seek an admission of assets, or call for an answer in the original bill; the end of the order of revivor being only to put the suit and proceedings in the situation, in which they stood at the time of the abatement, and to enable the plaintiff to proceed accordingly. A bill of revivor shortly sets forth the original bill, and proceedings, the abatement, and title to revive, and concludes with the following prayer. "To the end therefore that the said bill, answer, and other pro-"ceedings thereupon had, may stand revived against the said de-"fendants, and be in the same plight, state, and condition as the "same were in, at the time of the abatement thereof; may it "please your lordship, to grant unto your orator his majesty's "most gracious writ of *subpœna ad revivendum*, to be directed to "the said, &c. commanding them respectively, at a certain day, "and under a certain pain, therein to be limited, personally to be "and appear before your lordship, in this honourable court, then "and there to shew cause, if cause there be, why the said suit and "proceedings so abated, as aforesaid, should not be revived, and "be in the same plight, state, and condition, as the same were "in, at the time of the abatement thereof: and that your orator "may be further relieved in all, and singular the premises, as to your "lordship may seem meet, and his case may require: and your "orator shall ever pray, &c." And should the event, which occasions the abatement, be accompanied with other circumstances, necessary to be stated to the court, in order to obtain a complete decree, such circumstances must be stated to the court by way of supplemental bill, added to the bill of revivor. To a bill of revivor the defendant must shew cause in eight days after appearance, or the suit will stand revived, as of course.

Of putting in the answer.

If the defendant neither demur, nor plead, or if having demurred or pleaded, the demurrer or plea be overruled, he then proceeds to the most usual, formal, and conclusive defence, by putting in his answer, which is usually signed by counsel, (unless when taken by commissioners in the country, who are supposed to take it from the mouth of the defendant, as they originally did) and given in upon oath, unless by consent of the plaintiff, the answer be permitted to be taken without oath: for every plaintiff is entitled to a discovery from the defendant of the matters charged in the bill, provided they be necessary to ascertain facts, material to the merits of his case, and to enable him to obtain a decree. He is intitled to a discovery of matters necessary to substantiate the proceedings, and make them regular and effectual in a court of equity. However, if the discovery sought by the bill be matter of scandal, or will subject the defendant to any pain, penalty, or forfeiture, he is not bounden to make it: and if he do not think proper to defend himself from the discovery, by demurrer, or plea, according to the circumstances of the case, he may by answer insist, that he is not obliged to make the discovery. To so much of the bill, as it is necessary and material for the defendant to answer, he must speak directly and without evasion; and must not merely answer the several charges literally, but he must confess or traverse the substance of each charge. And wherever there are particular precise charges, they must be answered particularly and precisely, and not in a general manner, though the general answer may amount to a full denial of the charges.

Although the defendant by his answer deny the title of the plaintiff, yet in many cases, he must make a discovery prayed by the bill, though not material to the plaintiff's title, and though the plaintiff, if he have no title, can have no benefit from the discovery. When a bill is filed for tithes, praying a discovery of the quantity of land in the defendant's possession, and of the value of the tithes; though the defendant insist upon a modus, or an exemption from payment of tithes, or absolutely deny the plaintiff's title, he must yet answer to the quantity of lands and value of the tithes. Or if a bill be filed against an executor by a creditor of the testator, the executor must admit assets or set forth an account, though he deny the debt.

The several parts of an answer.

An answer usually begins by a reservation to the defendant of all advantage which may be taken by exception to the bill; a form, which has probably been intended to prevent a conclusion, that the defendant, having submitted to answer the bill, admitted every

thing, which by his answer he did not expressly controvert, and especially such matters as he might have objected to by demurrer or plea. The answers to the several matters contained in the bill, together with such additional matter as may be necessary for the defendant to shew to the court, either to qualify or add to the case made by the bill, or to state a new case on his own behalf, next follow, with a general denial of that combination, which is usually charged in a bill. It is the universal practice to add, by way of conclusion, a general traverse or denial of all the matters in the bill. This is said to have obtained, when the practice was for the defendant merely to set forth his case, without answering every clause in the bill. Though perhaps rather impertinent, if the bill be otherwise fully answered, and though it have been determined to be in that case unnecessary; yet it is still continued in practice *.

Exceptions to answer.

If a plaintiff conceive an answer to be insufficient to the charges contained in the bill, he may take exceptions to it, stating such parts of the bill as he conceives are not answered, and praying that the defendant may in such respects put in a full answer to the bill. These exceptions must be signed by counsel, and are then delivered to the proper officer; which must be done within a limited time, according to the course of the court, though upon application farther time be allowed for the purpose within certain restrictions. In chancery, if the defendant conceive his answer to be sufficient, or for any other reason do not submit to answer the matters contained in the exceptions, one of the masters of the court is directed to look into the bill, the answer, and the exceptions, and to certify whether the answer be sufficient in the points excepted to or not. If the master report the answer insufficient in any of the points excepted to, the defendant must answer again to these points of the bill, in which the master conceives the answer insufficient; unless by excepting to the master's report, he bring the matter before the court, and there obtain a different judgment. But if the defendant insist on any matter as a reason for not answering, though he do not except to the master's report, yet he is not absolutely precluded from insisting on the same matter in a second answer, and taking the opinion of the court, whether he ought to be compelled to answer farther to that point or not.

Where defendant pleads or demurs to any

Where a defendant pleads or demurs to any part of the discovery sought by a bill, and answers likewise; if the plaintiff take exceptions to the answer, before the plea or demurrer has been ar-

* Vide a general form of answer, Appendix, No. LXIX.

part of a bill and takes exceptions before the plea or demurrer are argued, defendant thereby admits the plea and demurrer to be good.

gued, he admits the plea or demurrer to be good, for, unless he admit it to be good, it is impossible to determine, whether the answer be sufficient or not. But if the plea or demurrer be only to the relief prayed by the bill, and not to any part of the discovery, the plaintiff may take exceptions to the answer, before the plea is argued. If a plea or demurrer be accompanied by an answer to any part of the bill, even a denial of combination merely, and the plea or demurrer be overruled, the plaintiff must except to the answer as insufficient. But if a plea or demurrer be filed without any answer, and be overruled, the plaintiff needs not take exceptions, and the defendant must answer the whole bill, as if no defence had been made to it.

Further answers form part of the first answer.

A further answer is in every respect similar to, and indeed is considered as, forming part of the first answer. So is an answer to an amended bill considered as part of the answer to the original bill. Therefore, if the defendant in a farther answer, or an answer to an amended bill, repeat any thing contained in a former answer, the repetition, unless it vary the defence in point of substance, will be considered as impertinent; and if upon reference to a master, such parts of the answer be reported to be impertinent, they will be strucken out as such, with costs, which in strictness are to be paid by the counsel, who signed the answer.

These exceptions must state particularly, and with accuracy, the points in which the defendant's answer is defective, or they will be rejected as vague and impertinent. Care should also be taken, that no point be omitted, to which exception can be taken, as no new exceptions can afterwards be added *.

These exceptions, like other pleadings in the courts of equity, are required to be signed by counsel, as a testification of their propriety, and after having been fairly transcribed, are filed in the proper office †.

When fur-

If the defendant allow the propriety of the plaintiff's excep-

* The forms of exceptions in both courts are alike, which see in the Appendix, No. LXXI.

† The rule prescribed by the court of chancery in respect to the time of filing exceptions to a defendant's answer is, that if the answer be put in during *term*, the plaintiff shall have eight days after the expiration of the term; and if in a vacation, he shall have till the same period, in the term immediately following. But in the exchequer, where greater dispatch is required, out of respect to the supreme magistrate, whose debtors the suitors of that court are supposed to be, the plaintiff must produce his exceptions within four days after the commencement of the next term, after the coming in of the defendant's answer, and set them down to be argued within four days after they are filed. If exceptions be not filed within those periods, the plaintiff is supposed to acquiesce in the defendant's answer; unless indeed, upon application to the court, he afterwards obtain leave to file them *nunc pro tunc*.

tions, he must within the time limited by the course of the court *, put in a further answer †. But if the defendant conceive his answer to be sufficient, an order is, in chancery, obtained to have the proceedings (that is to say, the bill, answer, and exceptions) referred to one of the masters of the court. Should the master report it insufficient, the defendant must submit to answer more particularly, unless by exceptions to such report of the master ‡ he appeal to the judgment of the court, and obtain a different determination. ther answers to be put in.

In the exchequer, the exceptions were formerly referred to one of the barons, who examined into their sufficiency, as the master does in chancery; but that practice has been long discontinued, and they are now argued before the court in the first instance, and there receive a final decision §. Exceptions in the exchequer.

In order that these exceptions may not be frivolous, or taken merely for the purpose of delay, they are not only required to be signed by counsel, but a deposit of 5*l.* is required to be made by the defendant with the register of the court, as a compensation to the plaintiff for the delay occasioned in the progress of his suit in the event of the exceptions being overruled ‖. Deposit on filing exceptions.

But if the master's report be confirmed, and the answer consequently determined to be insufficient, the defendant must within the time before-mentioned, positively and without further evasion, put in a further answer to the plaintiff's bill. Should his further answer be also insufficient, it may be excepted to in like manner as the first. But if it be a third time reported to be insufficient, the defendant will be committed to the *Fleet* Prison, till he put in a full and complete answer to every allegation material to be replied

* This in both courts is eight days in a town cause, and a fortnight in a country cause, though further time will be allowed on application to the court.

† Of which in the *exchequer* he must give notice to the plaintiff. A further answer is in all respects similar to and considered as part of the first answer; if therefore any thing contained in the first be repeated in the second; (unless it vary the defence in point of substance) it will be deemed impertinent, and expunged with costs.

‡ No precise time, within which exceptions are to be exhibited to a master's report, seems to be limited by either court: it must, however, be within a reasonable time after he has prepared his draft, or he may refuse to receive them.

§ By a late order of the court, exceptions are to be set down for argument at the expiration of four days (one exclusive and the other inclusive) from the day of their being filed: if this be neglected, they are overruled, as of *course*. See form of an exception to a master's report, App. No. LXXII.

‖ If the plaintiff prevail in any one of the exceptions, he will be entitled to the deposit.

to; and if his contumacy still continue, the plaintiff's bill will be taken *pro confesso*.

Replication. In order to proceed in the suit, it must be presumed, that the defendant's answer was either originally sufficient, or has at length become so by amendment. The next proceeding is the plaintiff's *replication*.

If the answer of the defendant controvert the facts charged in the plaintiff's bill, or set forth new facts and circumstances, which the plaintiff is not disposed to admit, (both of which is usually the case) he may maintain the truth of his own allegations, and deny the validity of those alleged by the other party in a *replication* * to the defendant's answer.

The replication being merely a contestation of the defendant's answer for the purpose of putting the allegations between the parties completely in *issue*, it is not required to be signed by counsel, but is filed by the plaintiff's clerk in court, as, of course, on receiving instructions for that purpose †. But a special replication must be signed by counsel, and may be demurred to. The next proceeding in a suit is the rejoinder of the defendant.

Rejoinder of defendant. According to the present course of the court, although rejoinders be disused, yet the plaintiff, after replication, must serve upon the defendant a *subpœna* requiring him to appear to rejoin, unless he will appear *gratis*. The effect of this process is merely to put the cause completely at issue between the parties. For now, immediately after the defendant has appeared to rejoin *gratis*, or after the return of a *subpœna* to rejoin, served upon the defendant, and which, by order obtained of course, is now usually made returnable immediately, and served on the defendant's clerk in court; the parties may proceed to the examination of witnesses to support the facts alleged by the pleadings on each side. Where, by mistake, a re-

* The replication, according to the modern practice, consists of a *general* averment only of the truth and sufficiency of the plaintiff's bill, and as general a denial of the same properties in the answer of the defendant; but formerly, if the defendant's answer stated new facts in opposition to those alleged in the bill, the plaintiff replied by a special statement of other facts not before charged. This produced rejoinders, sur-rejoinders, rebutters, and other multifarious pleadings on each side, which gave rise to the more recent practice of introducing such new positions as occur after issue joined by supplemental bill. But there still are cases, where a special replication may be necessary, or at least adviseable; as where a plaintiff is desirous of controverting only a part of the defendant's answer, and admitting the rest, or where he would avoid the effects of any improvident demands of his bill.

See the forms both of a common and a special replication, App. No. LXXIII.

† In chancery the replication must be filed within three terms after the defendant's answer; and in the *exchequer* formerly the *next*, but now the same term.

plication has not been filed, and yet witnesses have been examined, the court has permitted the replication to be filed *nunc pro tunc* *.

Examinations and depositions of witnesses.

We before remarked †, that the whole system of taking examinations and depositions before the regular examiners at home, or commissioners at a distance, in the spiritual courts, nearly resembles that, which prevails in the courts of chancery and exchequer. We are now come to that stage of proceeding in the courts of equity, which calls for a general developement of that system. The examination of witnesses in the courts of equity is conducted in private, and on interrogatories or questions in writing previously framed for that purpose. In chancery, if the witness reside within 20 miles of *London* ‡, this examination is taken before a public officer, appointed by the court for that particular purpose: but if they reside beyond that distance, a commission or *dedimus potestatem* is granted to four commissioners (two nominated by each party §) authorizing them to take the depositions of the several witnesses, at the respective places of their residence.

Difference between chancery and exchequer, as to examination of witnesses.

In the exchequer the range of the court, within which witnesses are examined in *London*, is only 10 miles; and the practice there differs from that in chancery likewise in this: that in chancery there is but one examiner appointed for the purpose of examining all witnesses resident within the circuit before-mentioned; whereas, in the exchequer, each baron has his own sworn officer for taking such examinations; and the several barons have, moreover, authority to take examinations personally before themselves; which authority is not confined to the ordinary range of the court in granting commissions, but extends to any part of the kingdom ‖.

* See the form of a rejoinder, App. No. LXXIV. †Page 247.

‡ The common range of the court of chancery, for ordinary purposes, is ten miles, and this is the distance limited by the court, in respect to the examination of witnesses; but in *practice*, commissions are seldom applied for, unless the witnesses reside at least twenty miles from *London*, as the expence of the commission, when they reside at a less distance, is found to exceed that of a personal attendance before the examiner.

§ The usual way of naming commissioners, is for the plaintiff and defendant to produce respectively four names, and each party striking out two, the remaining four are appointed commissioners. If, however, either of the parties object to all the four named by the other, the objecting party may move the court, that other four may be named in their stead; or if either party refuse to strike out two names, the court itself, on petition, will do it.

‖ For the forms of the commissions both in the chancery and exchequer, and the oaths of the commissioners, clerks, and witnesses, and the *subpœnas* to enforce the attendance of witnesses, &c. see App. No. LXXV. where may be also seen forms of interrogatories and depositions.

Publication of depositions.

The depositions being completed, they are closely bounden up, and (being secured from inspection by the signatures and seals of the several commissioners *,) sent to the court, out of which the commission issued by a messenger, who makes oath, "That the "said depositions have not been opened or altered since they were "delivered to his charge." They are then committed to the custody of the clerk in court who prepared the commission, if taken in the country, or detained by the examiner, if taken in town, till *publication* have passed †, by rule or order of court: after which they may be inspected, or copies of them delivered, at the request of any of the parties.

Articles to impeach testimony.

After publication has passed, the parties regularly are to proceed to a hearing; but should the evidence on either side appear exceptionable, on account of the discredit or incompetency of any of the witnesses, leave may be obtained, on motion, to object to the validity of their testimony ‡. The method of doing which, is by the exhibition of articles, which are filed in the office of the examiner, or of the six clerk of the court, accordingly as the original depositions were taken before him, or by commissioners, and interrogatories, (by leave of the court,) are framed upon them and exhibited before the examiner in chancery, or a baron in the exchequer, or by commission, and the depositions taken and published as in other casss. Exceptions may be taken to these, which having been admitted or rejected by the court, the parties proceed to a hearing.

Cause set

The cause being now ripe for hearing, it may be set down § at

* Unless the depositions be signed by the examiner and six clerk, they will not be permitted to be read at the hearing.

† When the examination of witnesses on both sides is perfected, either party serves the other with a rule or order of court, importing that the depositions will be made public, unless sufficient cause be shewn against it, within a time therein expressed. If no cause be shewn, the rule is made absolute; this is termed "passing publication," and absolves the commissioners and examiners from their respective oaths of secrecy.

‡ In strictness the proper time and manner of exhibiting objections against the competency of witnesses, is by interrogatories at the examination in chief before the commissioners or examiners; but as their incompetency is seldom known, till after the publication of their depositions, this indulgence is never refused, when grounded upon an *affidavit* substantiating its propriety.

§ In chancery the cause may be set down either before the lord chancellor, or the master of the rolls, at the discretion of the clerk in court, regulated by the importance of the suit, and the number of causes depending before each. Till the beginning of the last reign, the authority of the master of the rolls to determine causes, was much doubted and litigated. By the 3d Geo. II. c. 30. it was therefore declared that "all orders and decrees made by the master of the rolls, (except only such as by the course of the court are appropriated to the great seal alone,) shall be deemed valid orders and

the instance of either party ; and a *subpœna* to hear judgement procured and served as in other cases. down for hearing.

The form of this *subpœna* * in chancery, is the same as that already given, with a difference only in the label and indorsement, which express the purpose, for which the parties attendance is required. *Subpœna ad audiendum judicium.*

In the exchequer † the cause of citation is expressed in the body of the writ.

If however the defendants be a body corporate, a writ of *distringas*, instead of the *subpœna*, is to be served upon them conformably to the practice in requiring their appearance to the bill. Distringas to corporations.

The parties appearing, by their counsel, on the third day ‡ after the return of the *subpœna*, the allegations of the plaintiff, and the defendant's answer are briefly stated to the court, by the junior counsel on each side. The leading counsel of the plaintiff then enters more particularly into the nature, circumstances, and merits of his client's case, and informs the court of the points in issue between the parties. Such parts of the depositions and answer of the defendant as the plaintiff chooses to call for are then read, for the purpose of receiving the remarks and animadversions of his counsel. The defendant afterwards proceeds in the same manner Proceeding on arguing the cause.

decrees of the court of chancery, subject nevertheless to be discharged or altered by the person or persons holding the custody of the great seal, and so as that the same be not enrolled till signed by him or them."

* The *subpœna* to hear judgment, by the practice of the court, is made returnable three juridical days before that, in which the cause is appointed to be heard. The time of service previous to the returns is regulated by the distance of the party's residence from *London*. If he reside within twenty miles, that is to say, the usual range of the court, ten days are deemed sufficient notice ; but if beyond that distance, fourteen days are allowed ; except in the short vacation of Easter, when eight days only are required in the one case and ten in the other.

† In the exchequer the days appointed for the hearing of causes, are Mondays, Tuesdays, Wednesdays, Thursdays, and Fridays, in every term ; the *subpœna* may, therefore, be returnable on any of those days, "provided they do not fall upon the 30th of January, the 2d of February, Ascension-day, or Midsummer-day." The range of the exchequer in respect to the service of the *subpœna* to hear judgment, is by rule of court extended to sixty miles, within which ten days, and beyond which fourteen days notice is required to be given to the suitors of the time and place of their attendance, except in the short vacation between Easter and Trinity terms, when ten days are holden sufficient at the remotest distance. The forms of these *subpœnas*, both in chancery and the exchequer, are to be seen in App. No. LXXVI.

‡ On whatever day the party's appearance may be required by the writ, he has, in all cases, three days indulgence, (which are called days of grace,) before his appearance is actually required. The feudal law, from whence is derived the *quarta dies post* of our common law, as well as the canon and civil law, allowed three distinct days of citation before the defendant was adjudged contumacious for not appearing.

to make his defence, and the plaintiff's counsel are heard in reply; when the court proceeds to pronounce its decree, which is the final judgment or sentence of the court, upon the rights of the several parties in the cause, and is minuted down by the register, from the mouth of the chancellor or of the barons.

Subpœna to shew cause.

But if the defendant neglect to appear by his counsel at the hearing, the counsel for the plaintiff on proving service of the *subpœna ad audiendum judicium*, prays such decree, as he deems his client entitled to *, which, not being opposed, is granted as of course, with this reservation only, that the defendant, within a given time shall be at liberty to shew cause against its being carried into execution. For this purpose the plaintiff procures a *subpœna to shew cause*, which, being a *judicial* process, must be made returnable in term, and on a day certain, it will otherwise be set aside for irregularity.

These *subpœnas* are served in the same manner as those formerly spoken of; but there is no rule limited in respect of the time of service, which may therefore be on any day before the return.

Time for shewing cause.

It were to be wished, Chief Baron *Gilbert* observes, that a time was fixed for the service of this *subpœna*, as in the case of *subpœnas* to hear judgment; "for when the decree is pronounced in term "time, the party, (if the *subpœna* be made returnable the same "term, as it may be,) has but a very few days left to shew cause "against the decree, and is sometimes restricted in time to do it." This inconvenience is, however, in some degree alleviated by the liberality of the modern practice, which gives the defendant eight days, in which to shew cause, exclusive of the day of service.

If none shewn, cause at an end.

If the defendant shew no cause within the time specified in the order and *subpœna*, he is presumed to submit to the requisitions of the decree, and the cause is at an end; but if, at the return of the *subpœna*, he offer to the court sufficient reasons against the affirmance of the decree, the cause is restored, and the decree pro-

* But if, on the other hand, the *plaintiff*, after setting down his cause for hearing, neglect to attend, the court can only order it to be struck out of the paper of causes to be set down afresh, unless the defendant have taken the precaution to make an affidavit of his having been served with a *subpœna* to hear judgment at the plaintiff's suit, in which case, the bill will be dismissed with costs; "because a plaintiff may set down his cause, and yet upon further consideration of the matter he may not think fit to serve the defendant with a *subpœna* to hear judgment; in which case, it must be heard *ad requisitionem defendentis*, in order to entitle him to a dismission.

nounced, in the manner we have before mentioned, after a full discussion of the merits of the case.

Decrees are interlocutory or final.

The decree is either *interlocutory* or *final*; it is final, where all the facts and circumstanres material to be ascertained, in order to enable the court to do complete justice between the parties, are so fully adduced and established by the several pleadings in the cause, that no further elucidation is requisite. But where any material fact or circumstance is either omitted or strongly controverted, in the pleadings, it frequently becomes necessary to supply the defects in the one case, or ascerrain the truth in the other, by instituting an enquiry before one of the master's of the court, or by obtaining a verdict of a jury at law *; in these cases an *interlocutory* decree is pronounced to that effect, and the final judgment of the court reserved, till the event of those enquiries be known.

Reference to master or deputy remembrancer.

But as the questions most frequently agitated in courts of equity are such as involve in their nature or consequences matters of account, the most usual reference is to one of the *masters in chancery*, and the *deputy remembrancer* in the *exchequer*, who certifies his opinion to the court by his *report* concerning the matters referred to him. This report may be excepted to if partial or defective, in the manner before mentioned.

Definitive decree.

The court being at length, by certificate of the judges, the verdict of a jury, or the report of a master, possessed of every information necessary to enable it to adjust and decide the rights of all parties, the cause is again brought to hearing on the equity reserved, and a definitive decree made agreeably to equity and good conscience. The decree always recites the several pleadings, orders, and material proceedings in the cause, upon which the decree is founded.

* It seldom happens, that the first decree of the court is final: for if any material circumstance be positively asserted by one party, and denied by the other, the court (sensible of the deficiency of its peculiar mode of trial by written depositions) will direct the truth of the fact to be investigated and established by the verdict of a jury. In chancery, where by the practice of the court no jury can be summoned, the method of trial is by referring the fact to the court of king's bench, (or to the assizes, if the cause arise in the country,) upon a feigned issue between the parties. The usual method of doing which, is for the plaintiff to commence an action against the defendant for the amount of a supposed wager laid, that the fact disputed was so and so, as that A. was heir at law to B, &c. the defendant admits the wager, but avers that A. is not heir to B. by which that fact becomes at issue between the parties. Or in the court of chancery, if a question of law arise in the course of the hearing, it is referred to the judges of one of the courts of law, who certify their opinion to the chancellor; but in the exchequer, which is a court of law as well as a court of equity, such reference is unnecessary, as the barons are themselves, in their legal capacity, competent to determine the point in question.

Rehearing of a cause.

The decree being drawn up and approved; and signed in chancery, by the chancellor, and in the exchequer, by such of the barons as were present at the hearing, it is engrossed on rolls of parchment, and deposited among the records of the court, as a perpetual evidence of the proceedings. If, however, either party think himself aggrieved by the decree, he may before its enrollment* petition the court for a rehearing. For it can only be obtained, whilst the decree is *in transitu* and incomplete; for if it have received the signature of the chancellor or the barons, it can be revised only by supplemental bill. The method of obtaining a rehearing, is by entering a *caveat* with the proper officer against the enrollment of the decree†, and presenting a petition to the court requesting the indulgence of such rehearing. By order of court the application for a rehearing must be made within six months after the decree is pronounced. The petition‡ must state particularly the objections, which are conceived to lie against the decree, that the court may be competent to decide upon the propriety of the application; and if the whole decree generally be complained of, the case of the petitioners, and the decretal part of the order are shortly set forth; and an intimation is also usually given (especially if the cause were heard before a different judge) of the decree, which the petitioners are advised ought to have been made. And in order to prevent applications for rehearings being made for the purpose of delay, it is required in chancery, by order of court, that petitions for this purpose be signed by two barristers at law, as a testification, that the cause is in their opinion proper to be reheard. But, in the exchequer, where the merits of the petition are discussed in open court, this is not necessary. But in both courts, to guard against the same inconvenience of delay, the sum of 10*l.* is required to be deposited in the hands of the register of the court, by the petitioner, to answer costs to the other party, in case the application should prove to be frivolous.

Petitions for rehearing in exchequer argued in open court.

In chancery this petition is left with the chancellor or the master of the rolls, who seldom refuses to subscribe his *fiat* for rehearing; for the practice is, that where a petition for rehearing is signed by two counsel, such credit is given by the court to their

* Six months are allowed the party gaining the cause, to enroll the decree; if he delay it till after that time, he must apply to the court to enroll it, *nunc pro tunc*, which is usually granted of course.

† This *caveat* proceeds on the principle of preventing the inconvenience, which has been frequently found to result from the too speedy signing of decrees; and it stays the signature one lunar month from the time it is presented to the judge for enrollment.

‡ For the form of which vide App. No. LXXVII.

opinion, that it ought to be reheard, as to order it to be set down. But in the Exchequer, the petition is filed like other proceedings in the cause, and its merits discussed and determined in open court.

Upon the rehearing, all the evidence taken in the cause, whether produced before or not, is now permitted to be read; for it is the decree of the same court, which now sits only to hear reasons, why it should not be enrolled and perfected; at which time all omissions of either evidence or argument conducive to their information may be supplied.

The form of a decree upon a rehearing, differs from the first decree only, by the recital of such other proceedings as have been since had in the cause.

Decrees enforced by writs of execution and sequestration.

The decree being finally perfected, a mandate of the court is awarded to enjoin its performance; which, if the decree be *in personam*, i. e. directed against the person of the defendant, as for the payment of money, is by *writ of execution*, and in failure of that by writ of *sequestration* *.

If the party neglect to perform the decree, the ordinary processes of contempt before-mentioned, are issued against him till his effects be sequestered and sold to satisfy the plaintiff's demands.

Execution and attachment.

But if the decree be *in rem*, i. e. against the lands of the defendant, it is usual, after service of the writ of execution and attachment, for the court to award an injunction † and to give the plaintiff possession.

If after the enrollment of the decree, any new matter or evidence be discovered, which could not have been had or used, when the decree passed; or if an apparent error of judgment appear on the face of the decree, it may be reconsidered by means of a *bill of review* ‡.

* The forms of these writs are to be seen App. No. LXIII.

† The form of which writ see App. No. LXXVIII.

‡ A bill of review cannot be filed without leave of the court; because the chancery being the court of the prince, and the last resort, the decrees cannot be changed or altered without leave. But this applies only to those cases, where the bill is founded on the discovery of new matter; for when the error in the decree appears upon the face of it, the leave of the court is not necessary. And this leave is never granted, till the party have actually paid obedience to the decree, as far as he can do it, without prejudicing the rights he may seek to establish by the review, (unless indeed in some special cases, where the court will dispense with the immediate performance of the decree, upon the parties entering into sufficient surety for its performance eventually;) for otherwise it will be presumed, that the application is made for the sole purpose of delay, to prevent which, it is also required, that a certain sum be staked with the register of the court, to answer the expence of the bill of review; this sum was formerly 10*l.* but was afterwards increased to 20*l.* and is now raised to 50*l.*

Bill of review.

But in reviewing a decree no facts can be entered into, which were before in issue, or which were known to the parties, at the time of the former trial; for the same reason, that no witness can be examined in a cause after publication, that is to say an apprehension of perjury; and it must always be either for error appearing on the face of the decree, or upon some new matter, as a release, &c. For unless it were confined to such new matter, it might be made use of as a method for a vexatious person to be oppressive to the other side, and for the cause never to be at rest.

This bill must recite the former bill, and the proceedings, which have been had upon it; the former decree of the court; the points, in which such decree is conceived to be erroneous; and the facts, which have come to light, since the former hearing; after which the usual form, in which it proceeds is:

Prayer of.

"For all which said errors and imperfections in the said decree, "your orators have brought this their said bill of review, and "humbly conceive they should be relieved therein. In tender "consideration whereof, and for that there are divers other errors "and imperfections in the said decree and proceedings, by reason "whereof the same ought to be reviewed and reversed, to the "end therefore that the said decree, and all the proceedings there-"upon may be reviewed and reversed *, added to, altered, and "amended; and that the said A. B. may answer the premises, "and that your orators may be relieved in all and singular the "premises, according to equity and good conscience, &c. May "it please, &c. (to grant *subpœna* as in other cases.)

To a bill of review, the defendant seldom answers otherwise than by demurrer; for that the said decree is free from the errors complained of. This demurrer being set down to be argued, the court proceeds to affirm or reverse the former decree, and the prevailing party becomes entitled to the sum deposited to answer his costs.

Appeal to the house of lords.

If either of the parties be still dissatisfied with the decision of the court, in which the suit has been prosecuted, they have yet one further, which is the last resort, by appeal to the house of lords; which is made by preferring a petition † to that assembly.

* If the decree have not been carried into execution, the bill simply prays a reversal; but if the decree have been executed, the bill may also pray the further decree of the court to put the party complaining of the former decree into the situation, in which he would have been, if that decree had not been executed.

† The appeal is heard on a mere paper petition of the party, without any writ from the king, the foundation of which is said to be, that this house being the great court of

This petition is lodged with the clerk of the house, (with whom the appellant deposits 20*l.* and within eight days enters into a recognizance of 200*l.* to satisfy costs to the other party in case the decree be affirmed,) and being read in the house, the respondent is ordered to have a copy of the appeal, and a time is given him, within which he is required to put in his answer *. Appellant's petition.

The respondent's answer having come in, a day is appointed, of which notice is given to the other party, for hearing the merits of the appeal. The case of the appellant being stated, the respondent's defence made, and the evidence entered into on both sides † in the order, it was gone through at the hearing in court ‡. "Their lordships order and adjudge, that the appeal be dismissed, and the decree therein complained of be affirmed," or "that the said decree be reversed, and the bill of the respondent be dismissed;" or they pronounce such other decretal order, affirming, reversing, or varying the decree of the court below, as they think fit. This order being absolute and irrevocable, puts a final period to the suit in equity. Respondent's answer. Lords decrees.

As relief in decimal matters is now generally sought and granted in the courts of equity, it has been felt expedient for the sake of

the king, out of which the chancery was originally derived, a petition will consequently bring the cause and record before them. See the form of such a petition Appendix, No. LXXIX.

* And when an order is made for the respondent to answer, by a time limited, and no answer is put in by that time, upon proof made of due service of such order, a peremptory day shall be appointed for putting in the answer, without any further notice to be given to the respondents. Ord. 19 Jan. 1719. See the form of a respondent's answer App. No. LXXX.

† In rehearings and reviews, new matter, we have seen, may be added; but in an appeal to the house of lords no new evidence is on any account admitted. This court being a distinct jurisdiction, which differs very considerably from those instances, wherein the same jurisdiction revises and corrects its own acts. And it is a practice unknown to our law, (though constantly followed in the spiritual courts) when a superior court is reviewing the sentence of an inferior, to examine the justice of the former decree, by evidence, which was never produced below.

‡ The form of proceeding at the hearing of an appeal is prescribed by the house to be, that one of the counsel for the appellants shall open the cause, then the evidence on their side shall be read; which done, the other counsel for the appellants may make observations on the evidence; then one of the counsel for the respondents shall be heard, and the evidence on their side read, after which the other counsel for the respondents shall be heard, and one counsel only for the appellants reply. Ord. 2 Mar. 1727. And printed copies of the respective cases of the appellant and respondent are usually delivered to the lords, previous to the day appointed for the hearing. And by Ord. 19 April, 1698, they are to be signed by the counsel retained in the cause, of which, only two are allowed on each side in the house of lords; though any number may be engaged in the courts below.

such readers, as may not be conversant with the principles, usages, and forms of these courts, to lay before them so much of the system, as is necessary to disclose, account for, and enable them to avail themselves of the several decisions of these courts, by which they may shape their conduct in enforcing or resisting demands of tithes.

First then as to the parties to an English bill for tithes, there was a determination in an anonymous case * by the Exchequer, A. D. 1631, to the following effect.

Rector and vicar cannot join in one bill.

The farmer of the impropriate rector of *Pancras*, and the vicar of that church join in an English bill in the Exchequer chamber, against several owners of several lands in *Kentish town*, which is within that parish, and suggest divers moduses to be paid, some of them to the parson, and some to the vicar, and that the defendants have refused to pay them to the farmer of the parish and to the vicar, and that they have preferred this bill to avoid multiplicity of suits. The defendants demurred to the bill. 1. It was agreed, that a suit for tithes or a modus may be in this court. 2. The second doubt was, whether the farmer of the parsonage and the vicar can join in one suit for their several duties; or whether they ought to prefer several bills. And per *Denham* and *Weston* Barons, they ought to prefer several bills, because the inheritances are now severed and divided, though the vicarage originally were derived out of the parsonage: but it seemed to *Davenport*, C. B. that they might join in a bill in equity. But afterwards in his absence the demurrer was allowed, and the plaintiffs were ordered to prefer several bills.

Sequestrator alone cannot bring a bill for tithes.

In 1692, the Exchequer in *Berwick* v. *Swanton* †, resolved that a sequestrator could not bring in a bill alone for tithes, because he is a bailiff and accountable to the bishop, and has no interest. In 1713, in the ‡ *Bishop of Norwich* v. *Eachard and another*, the Exchequer confirmed this opinion, where upon a demurrer to a tithe bill, brought by the bishop, and *Eachard* as sequestrator, of the rectory of *Boaly*, in *Suffolk*, the bill charged, that the bishop was bishop of the diocess; that the rectory is within it, and had been vacant so long, that the bishop sequestered it, and granted it to the other plaintiff, resolved, 1st, that a sequestrator cannot maintain a bill. 2nd, That the bishop and sequestrator joining may maintain a bill. And accordingly the demurrer was overruled.

* 2 Gwil. 472, Turner's MS.
† Bunb. 192, and 1 Wood, 295.
‡ 2 Gwil. 210.

In 1723, in the case of the * *Bishop of London and Beaumont* v. *Nicholls*, a bill was preferred by the Bishop of London and *Beaumont*, as sequestrator during the incapacity of mind of *Barefoot* the then incumbent, for tithe-wood in the parish of *Birchanger*, in the county of Essex: the defendant demurs, for that it does not appear, that either of the plaintiffs had any title; and it was insisted upon by the counsel for the defendant, that (now, since the division of parishes) the whole right to the tithe was vested in the rector, and the bishop had nothing to do with the right, (ever since the stat. Hen. VIII. which relates to a vacancy,) but only to take care, that the cure be supplied, and the profits sequestered for that purpose; and the other plaintiff was only a sequestrator, who, as it appears by the form of the sequestration, and by his own shewing in the bill, was only an agent or collector; besides, the incumbent *Barefoot* should have been made a party; for possibly, at this time, he may have recovered his right senses; and if he should exhibit his bill, a recovery now could not be pleaded in bar of his demand. Baron *Price* was of opinion, that no decree could have been for the plaintiff, if it had been a sequestration during the vacancy, nor can there be in this case: but *Page* and *Gilbert*, barons, were of opinion the bill had been well enough, if *Barefoot* had been a party, either in person or by his committee; and the bill was dismissed, but without costs, the want of parties not being expressly assigned as a cause of demurrer.

Bill for tithes by bishop, and sequestrator during the incapacity of incumbent dismissed because incumbent no party.

In *Jones* v. *Barrett* †, 1726, a bill was exhibited by the vicar of *West Dean*, in the county of Sussex against the defendant, who was sequestrator, for an account of the profits received during the vacation: it was objected for the defendant, that the bishop ought to have been made a party, since the sequestrator is accountable to him for what he receives by the stat. 28 Hen. VIII. The court seemed to think the bishop should have been a party; but by consent this cause was referred to the bishop of the diocese. *Nota*, it was said a sequestrator could not bring a bill alone for tithes.

Bishop must be a party with sequestrator.

The interest of a plaintiff in a bill for tithes to qualify himself as a proper party to sue, is no unimportant consideration, as appears by the case of *the* ‡ *Archbishop of York, and Doctor Hayter* v. *Sir Miles Stapleton and others*, in 1740.

The Archbishop of *York* was entitled in *jure ecclesiæ*, to the

What qualifies a party

* Bunb. 141. † Bunb. 192. ‡ 2 Atk. 136.

to sue for tithes.

rectory of *Milton*, in Yorkshire; and, in 1733, granted a lease for three lives to Archdeacon *Hayter*, who made a derivative lease to one *Taylor*; and this bill is brought by the archbishop and Dr. *Hayter*, for an account of tithes in kind, and to establish the custom of setting out of the corn in stoocks or stacks.

It was objected, that there was no foundation for this bill, because Dr. *Hayter* having made a lease to *Taylor*, is not entitled to any account, and cannot maintain a bill to establish a custom of setting out in stoocks or stacks, which is a mere right.

Lord Chancellor *Hardwicke*. I am of opinion the bill to establish the custom is well brought; and that the person, who is entitled to the inheritance is properly made a party, notwithstanding the tithes themselves were out in lease at the time, for which the account is prayed; for otherwise it might introduce great inconveniences by a collusion between the lessees and the occupiers; and that a bill may be even brought, without praying an account, to establish a mere right only, appears from the common case of bills for establishing moduses, and therefore shall direct an issue to try the custom of the stacks or stoocks.

Plaintiff needs not set forth his title.

In *Crathorne* v. *Taylor* *, 1723, before the lords, the respondent in Hilary term 1722, exhibited his bill in the court of Exchequer, against the appellant, stating, that *William Redman*, of York, Esq. being seized in fee, or of some other estate of inheritance, or possessed for some long term of years, or otherwise entitled in his own right, or in trust for his children, *William Redman*, *Watkinson Redman*, and *Alice*, the wife of *Richard Atkinson*, in and to all those, the tenths and tithes of corn, grain, hay, and other tithes, as well great as small, &c. yearly arising and growing within the villages, fields, and hamlets of *Eastnesse*, &c. demised to the respondent, all and singular the said tithes for twenty-one years, under the yearly rent of 20*l*. That by this lease, the respondent became fully and legally entitled to receive, or otherwise to have a satisfaction made to him, for all the said tithes, growing or arising within all or any the places aforesaid. That the appellant, who was owner and occupier of several lands, pasture and meadow, within *Eastnesse* aforesaid, refused to pay the respondent, or to make him any satisfaction for the small tithes and herbage arising from the appellant's lands in *Easternesse* aforesaid, or which did grow or renew in the year 1721, out of, or upon the said lands and grounds; wherefore the bill prayed, that the appellant might

* 2 Bro. Parl. c. 512.

set forth the particular quantities and values of the said tithes, and that the respondent might have a satisfaction for the same, and be otherwise relieved in the premises.

To this bill the appellant demurred; and for causes of demurrer alleged, that the respondent had not by this bill set forth, as he ought to have done, how *William Redman*, who thereby appeared to be a layman, became entitled to the tithes demanded by the said bill, whether by grant, prescription, or otherwise, or what estate the said *William Redman* had in the said tithes, or whether he had power to demise the same, or that any estate in the said tithes did or could pass from the said *William Redman* to the respondent. For which reasons, and other defects in the said bill the appellant prayed the judgment of the court, whether he should be compelled to make any further or other answer thereto, and prayed to be dismissed with costs.

Demurrer over-ruled in exchequer when court equally divided.

On the 18th of May 1723, this demurrer was argued; when the court were divided in opinion; the Lord Chief Baron *Montague*, and Mr. Baron *Gilbert*, being for over-ruling it, and Mr. Baron *Price*, and Mr. Baron *Page*, for allowing it: whereupon, according to the course and practice of the court in such cases, the demurrer was ordered to be over-ruled, but without costs; and that the appellant should put in his answer to the said bill.

From this order the appeal was brought, and the decree was affirmed.

Plaintiff needs only state that he is entitled to the tithes.

In like manner in * *Lowther* v. *Bolton*, 1778, Sir *James Lowther* filed his bill, stating, that he was and for many years past had been seized in fee, and proprietor and owner of all and every the tithes of corn and grain, and other great and prædial tithes whatsoever, arising, growing, and renewing, within the manor and parish of Askam, and the liberties and precincts thereof.

The defendant demurred, for that the plaintiff had not shewn by his bill any title to the tithes.

In support of the demurrer it was urged, that the plaintiff stated no title whatsoever to the tithes, inasmuch as he did not state that he was seized of an impropriate rectory, or of a portion of the tithes of an extra-parochial place, or, in fine, what was the nature of his title.

The demurrer was over-ruled; and it was holden sufficient to sustain a bill for tithes, to state that the plaintiff was entitled to tithes without more.

* 3 Gwil. 1120.

Same point confirmed.

Leigh v. *Maudsley* *, 1730, was to the same effect, where a lay impropriator by his bill set forth, that in the year 1724 he was seized in fee of all impropriate tithes in the township of *Westhaughton* in the parish of *Dean* in the county of *Lancaster*.

Upon the hearing he went no farther in his evidence of the title, than that about thirty-four years ago, these tithes were reputed to belong to the *Andertons* of *Lostock*, under whom the plaintiff claimed; it was objected for the defendant, that there was not a sufficient title shewn, since the 32 Hen. VIII. And therefore it was incumbent on the plaintiff to shew how he derived them out of the crown.

But *per totam curiam*, if he had set out in his bill a title under the crown, and derived it down, he must have proved it as he had set it forth; but since he had not, this proof was sufficient.

No difference in setting forth tithe between a spiritual and a lay rector.

In *Burwell* v. *Coats* †, 1723, the court would not admit of any difference between a lay and spiritual person, as to the setting out his title. There was a bill by the plaintiff as lessee of the impropriate rectory of *Normanby* in the county of *Lincoln*, under the dean and chapter of *Lincoln*, for the tithe hay: it was insisted upon for the defendant, that the plaintiff (being a lay impropriator) had not set forth a sufficient title; and upon that the long controverted question, whether there were any difference between a lay and spiritual person (claiming tithes) was revived. But it was not now determined; for, *per curiam*, the title was well enough set forth in that case.

Tithe by parol qualifies not a plaintiff to sue.

But a lessee of tithes by parol, has not such an interest in the tithes, as entitles him to institute a suit for them, without making his lessor, who was the impropriator, a party; as was determined in *Hinning* v. *Willis* ‡, 1762. In a very recent case, 1796, § *Chayter and others* v. *Trinity College, Cambridge and Wood*, the court manifested the like liberality and latitude in permitting one plaintiff to prefer his bill in behalf of himself and others, to establish a contributory *modus* for lands in a certain district.

One owner of lands in a township may sue for himself and others to establish a contributory modus.

Wood, the lessee of the college, having sued for agistment tithe, the bill was to establish a modus. The plaintiffs filed it as owners and occupiers of lands within the township or district of *Thoresby*, in the parish of *Aysgarth*, on behalf of themselves and the other owners and occupiers of lands in the said township, to establish a contributory payment of 6*s*. 8*d*. in lieu of all tithes of hay and

* Bunb. 296. † Bunb. 129. ‡ 2 Wood, 29.
§ 3 Anst. 841, and 4 Wood, 507.

agistment in the township. It appeared, in fact, that the whole township belonged to the plantiff *Chaytor*, except two pieces which belonged to persons not parties.

The defendant's counsel objected, that this not being a parochial modus, but merely for a particular district, could not be supported by one for himself and the other proprietors, but all must be parties. The allowing one to sue for the rest in cases of a general right claimed by all the persons, who stand in the same relation to the defendant, as the inhabitants of a parish against the rector, or the tenants of a manor against the lord, is to save multiplicity of suits, arising from the whole parish or manor being interested.

They also argued, that a contributory modus could not be the subject of such a suit. For the ground of allowing one to support the interests of all, is, that their rights are similar, and a multiplicity of similar suits is avoided by it. Here the rights are not similar, but the same joint right; and only one joint suit can be brought to establish the modus, in which all the persons interested must be parties.

They also objected to the description of the lands as a township or district; and that the boundaries were not defined in the bill by abuttals, nor by the number of acres. In the evidence it appeared to be a township, and the boundaries were ascertained by the manors, on which it abutted on each side.

The court over-ruled the objections, and directed an issue to try the modus.

Lay impropriator as well as spiritual rector drives defendant to prove his modus or exemption.

It is here requisite to refer to the before mentioned case of *Charlton* v. *Charlton*, in which a very important distinction was taken between a person setting up a title to the rectory, and one, who entitles himself only to the tithes, or any species of tithes in a parish. For in the latter case the plaintiff shall be holden to strict proof of the title to the particular tithes he claims. So in *Whieldon* v. *Harvey**, 1735, where a bill was filed for all tithes great and small. The defendant insisted on the payment of a modus to the parson or curate. On the hearing it was insisted upon by the counsel for the defendants, that the plaintiff, being a lay-impropriator, ought not only to prove himself impropriator, but also the receipt of tithes in time of memory. For, though, through indulgence to rectors, it have been established that *nullum tempus occurrit regi aut ecclesiæ*, yet that rule does not extend to lay-impropriators.

* 3 Gwil. 951, MS.

Reynolds, Chief Baron, *Carter* and *Thompson*, Barons, clearly held that a lay-impropriator was entitled to all the favourable presumptions, to which a rector is, both with respect to time and exemptions; and if he prove himself impropriator, it will lie on the defendants to prove their modus or exemption.

From the two last mentioned cases, as well as another, * *Jennings* v. *Lettes*, 1755, it appears incontestable, that where an impropriator files his bill for tithes, it is only requisite for him to set forth in it, that he is seized of the impropriate rectory without setting forth, that he had ever received tithes.

Bill will not lie for a modus not disputed.

Having considered, how far the courts require the plaintiffs to have in them such an interest in the tithes, as shall entitle them to institute suits in equity, natural order next suggests the consideration of the grounds or suggestions, upon which such bills ought to be preferred, and in what instances the courts have or have not entertained them. In 1796, in † *Woolaston and others* v. *Wright and others*, the case was, that the liberty of *Shenton* in *Leicestershire*, lay principally, if not wholly, in the parish of *Market Bosworth*. It contained about 1400 acres. The plaintiff *Woolaston* was lord of the liberty, and owner of the greatest part of it; the other plaintiffs were the tenants occupying his lands there. An immemorial payment had been made by the lord of the liberty of the rector of *Sibson*, in lieu of tithes of some part of the liberty, to which he was entitled. There was evidence, that the land titheable to the rector of *Sibson* was nineteen yards of land, about a third of the liberty. A money payment having been also made for many years to the rector of *Market Bosworth*, the locality of lands titheable to each was in process of time forgotten. The rector of *Sibson* claimed his 7*l.* a year. The plaintiffs admitted his claim. The rector of *Market Bosworth* claimed and sued for tithes of the whole liberty. The plaintiffs filed their bill, praying that the modus of 7*l.* might be established; that the rector of *Market Bosworth* and the rector of *Sibson* might interplead as to the tithes to be covered by the 7*l.* modus; and that a commission might issue to ascertain, what lands in the liberty were within the parish rectory of *Sibson*, and what within the other parish or rectory.

The rector of *Sibson* admitted, that he was only entitled to the modus in lieu of the tithes of lands in the liberty due to him.

The counsel for the rector of *Market Bosworth*, took the following objections to the bill:

* 3 Gwil. 952. † 3 Anst. 801.

1. That a bill will not lie to establish a modus, which is not disputed; the rector of *Sibson* claims nothing else.

2. That the two rectors claiming different things, the one tithes in kind, the other a modus, could not be called upon to interplead.

3. That the commission could not be granted.

4. That the other owners of the lands in the liberty ought to have been parties.

And the court were of opinion for the defendant, on all the objections. And the bill was dismissed.

Courts not punctilious on forms of pleading.

Courts of Equity will not bind plaintiffs to too close and technical precision in demanding their rights; provided they set forth the substance of their demands, the courts will entertain the bill; and therefore Lord Hardwicke, in 1747 determined, that the specific word *modus* was not necessary to be used in laying a modus, as in *Richards* v. *Evans*, and *vice versâ* *.

The plaintiff, as rector, brings a bill for payment of tithes in kind; the defendant as owner of the farm, brings a cross-bill for establishing a customary payment of 7*l.* per annum, in lieu and satisfaction thereof.

For plaintiff. This modus is neither well laid nor proved, nor is the day of payment certainly specified; for want of which a modus was holden bad in point of law in the Exchequer, Trinity term 5 Geo. I. because the time of payment of a modus ought to be as certain, as of the tithes, in place of which it is substituted; which as to the fruits of the earth is immediately on the first severance; and a custom uncertain is no custom. Then the payment of such a gross sum is an evidence against the modus, as too rank; for as every modus must be presumed to have commenced before the time of memory, this many years ago must have been very near the value of the farm: it is therefore rather a modern composition, or rent for tithes.

Lord Chancellor *Hardwicke*.

The objections to the laying the modus are of no weight; for neither in law nor equity is there any necessity to use the word modus, as appears from all the cases on this head, as in *Cowper* v. *Andrews*, Hob. 39. *Shelton* v. *Montague*, Hob. 118, and 1 Ven. 3, it being only a technical term not used in pleadings; in the stating of which Lord *Hobart* was very accurate. The material words are so much money paid in lieu and satisfaction of tithes. As to

* 1 Ves. 39.

the general question, whether it be necessary to lay and prove a particular day of payment; the case in the Exchequer was certainly so determined; but I remember that gave general dissatisfaction in Westminster Hall, and abroad, as too nice to require the proof of a particular day; and it has been since adjudged to the contrary, that *on or about* is sufficient; so that they have left off taking that exception in the Exchequer. Then it rests on the merits; and that depends on the evidence on both sides, which is of two kinds; first, of the fact and usage of payment; secondly, such as arises out of the nature of this modus. If it turn on the first, it is the strongest evidence I ever knew against payment of tithes in kind, for which there is no proof on the part of the rector: that, indeed, being the only negative, would not prevail to take away the common right, that is in the rector, if there were nothing more; but in support of the customary payment there is the evidence of some terriers, which makes a distinction throughout between this and other parts of the parish, where tithes were paid in kind: and there is the rector's own admission of this. As to the remaining objection to the modus, arising from the nature of it, as too rank, several indeed have been overturned on this point; but the distinction taken from the defendant is material, that a modus may be overturned for rankness, even at the hearing of the cause, where it is for a specific thing, as a lamb, &c.; because the price of the thing may be found from history and ancient records; but that is an objection from a fact, which, because it appears with such a degree of certainty, the court determines without sending it to be tried; but where it is not for a specific thing, there are several other circumstances to be taken into the consideration of rankness; as the difference of value in the course of time. The house of lords, therefore, sent a case of this sort to be tried without over-ruling it. If this had come singly upon the rector's bill, it should have been without scruple immediately dismissed; for that would not have hurt the succession; nay, it would be open to the rector himself. But the owner bringing a bill also to establish a modus, that would bind the successors in the parish; and it being of consequence, that a great part of the evidence arises from the rector's own admission, if the defendant insist on establishing it, the rector (unless he submit to that decree) shall have an opportunity of trying it at law.

Whether necessary to

Yet in *Goodwyn* v. *Wortly*, and *vice versâ* *, 1732, the Exche-

* 2 Wood, 331.

quer dismissed the cross bill with costs, which had been filed for establishing a modus layed as payable at Lammas. Whereas it was found by the jury, that it was payable at Easter. But then again, in 1722, the court expressed a different opinion upon the necessity of laying the time at which a pecuniary modus was payable, as in *Goddard* v. *Keble* *. It must, however, be here noted, that the laying of a modus in his answer, or plea, is as to its effect in this regard the same, as when laid in an original bill or a cross bill. A bill was preferred by the rector of *Castle Eaton*, in the county of *Wilts*, for tithe; the defendant insisted upon several moduses; first, three-pence for every milch cow in lieu of tithe milk; 2dly, three-pence for every lamb yeaned in the parish, (but this was given up as too rank, for ten three-pences amount to the present value of a lamb;) 3dly, one shilling for a dry cow and ox depastured, &c.; 4thly, one penny for each dry sheep not shorn in the parish; 5thly, three-pence for every colt fallen. It not being alleged at what time these moduses were payable, the defendant was decreed to account. The reporter conceived that to be the first instance in a court of equity, that moduses were disallowed upon this reason †. And the like was done in *Penrice* v. *Duggard* ‡, 1722, where a modus of 4*l.* 10*s.* for all small tithes arising on an estate called *Impney*, was set aside, because no day of payment was set forth by the defendant in his answer. In 1785, Lord *Kenyon*, whilst master of the rolls, was of a different opinion; for in § *Anderton* v. *Davies and others*, a bill was preferred to establish moduses, viz. 2*d.* for a cow, 1*d.* for every tenth calf, 2*d.* an acre for hay, and 2*d.* for a garden. The bill laid the payment on the 31st of December; the evidence was of payment at Easter. It was objected that this, in a bill to establish a modus, was fatal. The Master of the Rolls, Sir *Lloyd Kenyon*, over-ruled the objection, and the defendant declining an issue, ordered the moduses to be establised, and that the plaintiff should pay the defendants the costs of the suit. This decree was in fact by consent, but his honour had been of opinion in a case *Sanders* v. *White*, and *Baliol College*, that with respect to moduses, as to which the vicar prayed no issue, he should have costs; and as to moduses which were tried upon issues, and found against him, they should be established without costs.

lay the time of payment of a modus.

When costs follow the decree.

* Bunb. 105.

† There was the same resolution in *Pemberton* and *Sparrow* and others, June 7, 1722. And in *St. Eley* and *Prior*, Feb. 3, 1723-4, upon the same reason the time not being mentioned, and in several cases since that time.

‡ 3 B. E. L. 430. § 4 Gwil. 1263.

Difference of laying a modus in an answer and a cross bill.

A difference has been taken by the courts between laying the time of paying a modus in an answer, and in a cross bill: for in *Gibb* v. *Goodman and others*, 1733, the bill was for tithes by the vicar of *Bedminster*, in the county of *Somerset*. The defendant insisted on a modus of four-pence for the milk of each cow, and six shillings and eight-pence for every tenth calf, for the tithe of all calves. No day was alledged in the answer, which, according to former precedents, seemed to be a fatal objection, yet *per totam curiam*, the defendants were permitted to prove the day by depositions; and thereupon the court directed an issue to try the same, with liberty to indorse the *postea*.

The Lord Chief Baron took this distinction, that in an answer the day might be supplied by the evidence, so as to be a foundation for the court to direct an issue; but in a cross bill to establish a modus, a day must be expressly alleged.

It was objected, that the 6*s*. 8*d*. was too rank; and it was not alleged, that any thing was payable, if there were less than ten calves; both which seemed material objections; but the court thought a verdict might make it good.

May the 20th, 1734, this cause came on again upon the return of the *postea*; the jury found the issue for the modus for the milk, and that the modus of 4*d*. was payable at Easter; so as to *that*, the bill was dismissed with costs, both at law and in equity as to so much. As to the other modus for calves, the jury found it, but no day when payable; but upon the objection, that it was not said, "and so in proportion, if there be a less number than ten;" and the jury not having found it so (if they had, *quære* if it would have made any difference) the defendants were decreed to account for tithe calves, but no costs * were allowed on either side at law as to this modus, the *fact* being for the defendants, the law for the plaintiff.

Latitude allowed in laying a modus in a bill.

Great latitude in laying moduses in a bill was allowed by the Exchequer, in *Gills* v. *Horrex* †, 1757. The defendant insisted on a modus of 4*d*. for every acre of grass cut and made into hay, in lieu of the tithe of hay, and brought a cross bill against the rector to establish such *modus*. On the hearing it was objected, that the *modus*, as laid, was illegal, in as much as it was not said, "and so in proportion for a greater or less quantity than an acre."

* According to Wood, 2 Vol. 347, the plaintiff had his costs as to the tithe of calves.

† 3 Gwil. 861.

This objection was argued two several days, and the court took time to consider.

The court declared, that the *modus* was sufficiently set forth, and ordered a trial at law by a special jury. Upon the trial the *modus* was found, and afterwards established against the rector.

In the same cause the defendant stated, that there were several lands in the parish, which were exempted from tithes, and there were other lands, whereof the rector was intitled only to a moiety of the tithes, and the above *modus* in lieu of tithe hay was laid for every acre of grass, except on the lands, which were tithe-free, and those, for which tithes were paid in moieties. An objection was taken to the legality of this *modus*, because the defendant had not particularly set forth the lands, which he said were exempt, or for which tithes were due in moieties, which he ought to have done. But this objection was at the same time over-ruled.

Court will help out an imperfect manner of laying a modus.

In the like spirit of liberality and indulgence to suitors, has the court been known to help out and amend the imperfect manner of setting out the moduses wished to be established. So in *Mallock* v. *Brewse* *, 1763, a bill was exhibited by the plaintiff, as impropriator of the rectory and vicarage of *Termoham* and *Cockington* in *Devonshire*, for tithes of apples, (except for antient orchards,) in respect of which the bill admits a *modus*. The defendant in his answer, which was very confused and unintelligible, set out the copy of a paper writing, which he had from the steward of —— *Carey*, Esq. containing an account of a *modus* in the parish of *Cockington*, (and which account the defendant said in his answer he believed to be true;) in which it was said, "*cyder 2d. per hogshead.*" In another part of the answer he insisted that tithes of apples, though grown in late planted orchards, were not payable in kind.

It was urged for the plaintiff, that it did not appear what the *modus* was, which ought to be set out with some degree of certainty, that the plaintiff might know what the defendant relied on, and how to apply his evidence.

Sir *Thomas Clarke*, master of the rolls:

If it appear, that a pecuniary payment was made for any sort of tithes, the court will help the imperfection in the manner of setting out the *modus*, and put a sense upon the words; and accordingly directed an issue, to try whether a *modus* of *2d.* per hogshead of cyder were payable throughout the said parish, in lieu or satisfaction of tithes in kind for such apples as were used in making cyder.

* Amb. 423.

The courts have been latterly more punctilious about laying moduses with precision.

In the case of *Coggan* v. *Lord Lonsdale**, before Lord *Rosslyn*, 1794, the court appeared to insist with more punctilious rigour upon the moduses being laid with precision. The plaintiff, as being seized in fee of the impropriate rectory of *Laleham*, filed his bill against the defendant for an account of tithes of hay and clover arising on lands occupied by him within the parish; and the bill alleged, that *Alexander Cromleholme*, who was vicar of the parish of *Staines*, and was made a defendant to the bill, claimed to be entitled to the tithes of hay and clover arising within the parish, and that the defendant, Lord *Lonsdale*, pretended that there was some modus payable in lieu of the tithes of hay and clover within the parish; and it required the defendant to set forth (if he set up any modus,) to whom the modus was payable, and also to set forth what lands he pretended were covered by it.

The defendant, Lord *Lonsdale*, by his answer said, that he had heard and believed, that from time immemorial there had been a certain ancient and laudable custom used and approved within the parish, that all the occupiers of land within the parish had paid, and of right ought to pay at *Michaelmas*, yearly, the sum of 2*d. per* arce, for every acre of meadow land so occupied by them within the parish, in lieu of tithes of hay and grass arising within the parish, and the answer stated, that the defendants had not had any clover during the time mentioned in the bill.

To this answer the plaintiff excepted; 1st, for that the defendant had not set forth *to whom* any modus, composition, rent, or yearly sum of money had been paid or payable in lieu of the tithes of hay and clover; 2d, for that the defendant had not set forth of what particular lands, by name, descriptions, and quantities, he set up any exemption or discharge from the payment of tithes, and particularly the tithe of hay.

These exceptions were allowed by the master; and his report being excepted to, they were argued, and the lord chancellor was of opinion, that the answer was insufficient; consequently that the master had done right in reporting it as insufficient, and that both of the exceptions to his report ought to be over-ruled. With respect to the first exception, the defendant was certainly able to say, and ought to be made to say, to whom the *modus* had in fact been paid. And with respect to the other exception, the defendant might, and therefore ought to set forth the particulars of his own lands, which he pretended were covered by the modus he insisted upon, although he had insisted on it as a modus extending to all lands within the parish. Exceptions to the report over-ruled.

* 4 Gwil. 1404. MS.

The court of Exchequer, in 1795, expressed themselves more explicitly upon this subject in the case of *Lord Stawell* v. *Atkins**, which was a bill establish a modus; *Burton* objected that the modus was not properly set out, being pleaded as a farm-modus, and the farm not stated to be ancient, and to have immemorially consisted of the same parcels as at present. These averments he contended to be necessary, and that they had often been so declared by Mr. Baron *Perrot*. The defendant is not bounden to pick out the meaning of the plaintiff by any inferences. The bill must state expressly the case to be answered. How farm modus to be laid.

Partridge and *Plomer* for the plaintiffs, argued, that the bill contained every necessary allegation. It set out the farm, with all its parcels, the number of acres, and the abuttals of each close; and averred, that the modus had immemorially been paid for the said farm. This allegation can only be supported by proving, that the farm is ancient, and has immemorially continued the same as it is now.

Macdonald, Chief Baron.—This seems to me to be in sense a sufficient averment of its being an ancient farm. If it had not immemorially continued the same, the modus could not have immemorially been paid for the same farm. The exclusion of any other supposition seems a sufficient averment of the fact.

Hotham, Baron.—It is very true, that in bills to establish a modus, it is necessary to set forth with certainty the case, which the defendant is to answer; but here he must see, that the antiquity of the farm is a necessary part of the plaintiff's case as stated in the bill. No precise form of words seems necessary, if the meaning be clear.

Perryn, Baron.—Mr. *Burton* has stated very correctly the opinion of the late Mr. Baron *Perrot*. In a bill to establish a modus, the plaintiff must state his case clearly, and can only recover according to his allegations. The being an ancient farm is a necessary part of the present case, and ought to be distinctly averred, and not left to be drawn as an inference from other averments; and the practice has always been accordingly.

The point being reserved upon this difference of opinion this day,

Perryn, Baron, said, that upon further consideration he acquiesced in the opinion of the other barons.

In *Nash* v. *Thorn*†, 1789, two bills were filed by the rector of *Long Burton*, with the chappelry of *Holnest*, against the

* 2 Anst. 564. † 4 Gwil. 1324.

defendant and occupier of the lands in the parish, the one for the tithe of lambs, the other for hay and wool. To the first bill the defence was in substance as follows: "that 14*s*. 2*d*. had been immemorially paid by the occupier, &c. in lieu of all tithe except corn and grain; and except the tithe lawfully payable to the vicar for an *estate* and lands called *Taylor's*, part thereof being in the defendant's occupation, for which he payed 10*s*.; part in A's occupation, for which he payed 3*s*. 3*d*.; and the remainder in B's occupation, for which he payed 11*d*. making together 14*s*. 2*d*." Similar moduses were stated as to six or seven other farms, and an allegation, that no tithe in kind had been ever paid (except as aforesaid.) The defence to the other bill was to this effect: "that the defendant had paid no tithe, nor had any been yielded to any rector; therefore the defendant believed the estate exempted and discharged immemorially, though he could not set forth by what means." The court decreed an account in both bills with costs; in the first, being of opinion, that the modus was bad, for want of distinguishing what tithes were covered by it; that is, that all tithes (except corn and grain, and except the tithe due to the vicar was not sufficiently certain:) in the 2d, because the defence was laid in a prescription in *non decimando*.

In *Atkins* v. *Lord Willoughby De Broke and others* *, 1794, to a bill filed by the rector for tithes, (and for a commission to ascertain boundaries, as to which it was dismissed,) the defendants, Lord *Willoughby* and his tenant *Goodcheap*, set up an *immemorial payment, due and payable by the owners* or *occupiers of those lands*, by way of modus or composition for the small tithes of their land; it consisted of 340 acres, and was stated to be an ancient farm settled by a parliamentary entail on the family of Lord *Willoughby*, in the 37 H. VIII. No evidence was produced of any actual agreement for a composition having been ever made. The existence of the payment, as far back as could be traced, was clearly proved. Sir *Thomas Hatton*, lessee of the rectory under the plaintiff, had received this composition. The plaintiff himself never did, nor did *Goodcheap*, the occupier of the farm, ever pay it, having come into possession but a few months before the bill was filed. He insisted on the payment, as being good at least as an annual composition, to determine which no notice had been given.

Graham and *Richards*, for the plaintiff, contended, that this

* 2 Anst. 397.

modus was not set forth with sufficient certainty; it was pleaded as a *modus or composition*; whereas the claim of exemption set up, being against common right, must be accurately defined.

The payment is said to be due from the owners *or* occupiers. This leaves the clergyman uncertain, to whom he shall resort for the recompence he is to receive for his tithes; each may shift it upon the other.

Macdonald, Chief Baron. To the modus set up in this case several objections have been taken: first, it has been argued, that it is not laid with sufficient certainty to found a decree; and if this were a bill to establish these moduses, that might be the case; but in an answer, such strictness is not requisite; if it appear, that there is a good defence, that is sufficient. And in a similar bill by the same plaintiff (*Atkins* v. *Hatton, Bart. and others* *,) the like defence was set up, when the counsel for the plaintiff insisted, that the exemption set up as a modus or composition real was bad for uncertainty; but the court held, that as it was stated to have been immemorially paid, there was a sufficient certainty for a defence: although had it been a bill to establish a modus, greater accuracy might have been required.

Greater accuracy required in stating moduses in a bill than in an answer.

Some different light was thrown upon this question in 1778, in *Vyse* v. *Duntze* †, though the court in that case came to no decision. It was a bill for vicarial tithes, to which moduses were set up for four farms. *Kenyon* objected to the manner of laying the modus for want of first stating, that "there is a certain ancient farm consisting of so and so," in order to apprise the plaintiff of what the claim precisely extended to. The answer only stated, *that the defendant was owner of an estate called* H. and so on.

Macdonald for the defendant said, that the certainty was supplied by the plaintiff's bill, which stated, that these four estates consisted of 200 acres, and the defendant admitted himself to be owner of these estates with the qualification.

Heath Serjt. S. S. insisted, that it was not necessary to lay it more certainly, because it needed not to be proved: it would have been good if laid, "more or less;" if so it was certain enough. It is not necessary to state the number of acres in particular.

Kenyon in reply said, it was convenient, that certainty should be attained, because as it is to deprive the vicar of a quantity of tithe, it should be known what that quantity is. Nor is it certain, taking the bill and answer together; because here are several

* 2 Anst. 386. † 3 Wils. 1124.

moduses, and it is necessary to know to how much each particular modus applies. As to the park, it is always stated to be an ancient park. The word immemorial is applicable in the answer to the payment only, and not to the land. He cited *Burwell* v. *Coales*, Bunb. 129, as in point.

Lord C.B. The use of stating the number of acres is to ascertain the land: if it be ascertained by other means, the end is answered. The question is, whether that be here done? It is not so uncertain, as the case in *Bunbury*, for there only a farm was mentioned without a name, I therefore doubt upon it.

The other barons thought, that the name did not give sufficient certainty, and that it was not supplied by the bill.

The cause stood over with leave to amend. Note, *Kenyon* thought it a very critical objection, and *Heath* found two or three authorities against it the next day, but the merits being against him, they were not mentioned.

In like manner did the court think upon the degree of certainty necessary in an answer to describe the particular lands, to which a modus applied, in the case of *Croft* v. *Ayre and Bailey**, 1790, where to a bill for tithes, the defendants admitted the rector's right to tithes, except in the township of *Risby*, which consists of 930 acres or thereabouts of inclosed lands, whereof 1st, certain parts are demesne of the manor or lordship of *Risby*, and contain 156 acres or thereabouts; 2nd, other parts are ancient inclosures, and contain 432 acres or thereabouts; and 3rd, the remainder are 342 acres or thereabouts; they insist upon an immemorial custom, that the owners and occupiers should pay the rector yearly at *Michaelmas*, in lieu of all tithes, offerings, payments, dues, and duties, sum and things increasing, happening, &c. the several ancient payments or moduses following, *viz.* 1st, for the demesne lands, 3*l.* 2*s.* For the ancient inclosures, 1*l.* 10*s.* 3*d.* For all the land in *Risby* accustomed to pay tithe in kind 12*l.*; which amounting together to 16*l.* 10*s.* have been immemorially paid after allowing the land tax, amounting sometimes to 1*l.* and sometimes to 1*l.* 4*s.* as a modus in lieu of all tithes, &c. within the said several lands; that the defendant *Ayre* occupies an ancient farm called *Town Farm*, viz. a messuage and 279 acres of land, being part of the said several lands covered by the said moduses some or one of them, and particularly part of the demesne part of the ancient enclosures, and part of such other lands, but difficult to distinguish how much and

* 4 Gwil. MS. 1325.

which of each; but she believes 70 acres of demesne, and 110 acres of ancient inclosures: that the defendant *Bailey* occupies an ancient farm called *Baileys*, viz. a messuage and 105 acres of land; that he is under the like difficulty of distinguishing how much of each species of lands, but believes forty acres of ancient demesne, and fifty acres of ancient inclosures: they denied that tithe was ever due or paid in this township from time immemorial, &c. but they do not allege, that the modus was ever paid or tendered by any one. The Chief Baron asked, whether the defendants had by the answer ascertained the three different species of land; which being answered in the negative, he observed it was impossible to direct issues upon any of these moduses; though he wished to assist the defendants out of the difficulty of having tacked the third to the two others; if a decree were pronounced for an account only of the third description, when the rector came for his tithes, the occupier might say *no*, these are demesne or old inclosures. All the court being clearly of the same opinion, decreed an account of all the tithes demanded by the bill with costs, but without prejudice to any future claim to the benefit of the moduses defectively set forth in the answer.

Case of *Scott* v. *Allgood* upon farm moduses.

In the case of *Scott* v. *Allgood and others, and e contra*, 1792 *, the original bill in this cause was filed by Dr. *Scott*, as rector of the parish of *Simonburn*, in the county of *Northumberland*, against the defendants for an account and payment of agistment tithes; stating the defendants to have been in the occupation of farms, within the parish, of the different denominations mentioned in the bill.

The defendants by their answer insisted on a modus in lieu of agistment tithe; and they filed a cross bill against the rector, praying, that the modus might be established. The modus, which was laid in the same way in the answer to the original bill and in the cross bill, was thus stated: the defendants stated, that they were respectively in the occupation of ancient farms (naming them) within the parish of *Simonburn*: that the parish of *Simonburn* was divided into two districts, viz. the district of *Simonburn*, and the district of *Bellingham*: that the whole of the district of *Bellingham* consisted of ancient farms; and that the whole of the district of *Simonburn* before allotments were made under an act of parliament for inclosing certain moors or commons within the district, which act is particularly mentioned in an answer, consisted of

* 4 Gwil. M3. 1369.

ancient farms or of several moors or commons, upon which the tenants or occupiers of the said ancient farms had respectively a right of common for their commonable cattle, as appendant or appurtenant to such their respective farms; that from time immemorial within and throughout the whole district of *Simonburn*, and within and throughout the whole district of *Bellingham*, the sum of 1*d.* for each and every ancient farm, (except a farm called *Tukets*, for which a general modus in lieu of all tithes was paid,) within the said districts, had been, and then was annually at *Easter* constantly and invariably paid, and payable by the owner or occupier for the time being, of each and every of the said ancient farms, and the lands and grounds thereunto respectively belonging to the rector of the said parish of *Simonburn*, for the time being, in lieu and full satisfaction of the tithes of all grass yearly growing, and renewing upon the said ancient farms, and lands, and grounds thereunto respectively belonging, whether such grass were made or cut into hay, or agisted by barren or unprofitable cattle.

The rector, by his answer to the cross-bill, admitted, that he received the sum of 1*d.* annually from the plaintiffs, in lieu and satisfaction of all tithe hay growing on the farms in the occupation of the plaintiffs.

The counsel, for the rector, insisted, that the modus could not be established as laid in the cross bill: that these being moduses, which were to cover particular farms, the plaintiffs ought to have stated the boundaries and the particular quantities of land of each farm, which they alleged were covered by such moduses; whereas here they had merely alleged, that they were in possession of such ancient farms (naming them) but not stating the quantity of land, of which any of them consisted, or the boundaries of any of them.

The opposite counsel admitted, that where a bill was filed to establish a modus for a particular farm, it ought to state the quantity and limits of the farm; because the effect of the decree establishing such a modus, would be to exempt those particular lands from the payment of tithes in kind: but that the modus here insisted on was a parochial modus for every ancient farm throughout the parish, and a decree establishing it would only establish a general custom but would not exempt any particular lands: and the occupier of lands within the parish, who would avail himself of the modus, must shew, that the farm he occupied was an ancient farm, and of what lands it consisted: that a case perfectly analogous to this, was that of a bill to establish a modus for every ancient orchard or garden in a parish: that in such a bill, it could

not be necessary for the plaintiffs to state the number of acres and boundaries of their own orchards: that the modus being for all orchards, if it were necessary to state the particular boundaries of any, it must be of all the orchards in the parish, which it would be impossible for the plaintiffs to do: and so in the present case; the modus being for all ancient farms, if it were necessary to describe any, the plaintiffs must describe the boundaries and quantities of all ancient farms, those of the occupiers, who are not before the court, as well as their own: that the court had already considered this modus as a parochial modus by ordering the cross bills, which were originally three in number, to be consolidated; for if they were to be considered as distinct farm moduses, there could be no reason for consolidating them, and the plaintiffs in some of them, were by those means deprived of the benefit of the testimony of the plaintiffs in the others of them, who might have been witnesses; that the rector admitted, that a penny was payable by each farm for hay, and if there were no uncertainty as to that, there could be none in the same modus extending to agistment, which was the real question between the parties.

Eyre C. B. This is not a parochial modus, nor any thing like it. It is essential when this sort of modus is established, that the rector should know what are the particular lands covered by it. He will not know where to resort, even for the payment of the modus, unless he know what lands are covered by it. The case of orchards I think does not assist you. It is true, that in a bill to establish such a modus, the plaintiffs need not set out the quantities and boundaries of their orchards: but that is very different from an ancient farm. The name of an orchard is in the nature of the description of the thing, and the mere inspection will help to ascertain what is an ancient orchard. However, though it be impossible to establish the modus, as laid in the cross bill, which is an application for the extraordinary assistance of this court, it may be a very different consideration, whether the modus, as laid in the answer, may not afford such a defence as should prevent the plaintiff from having an account of tithes.

The rest of the court were of the same opinion.

Vicar needs not set forth his title.

If a vicar prefer his bill for vicarial tithes, he needs not set forth how they become due, as in *Button* v. *Honey**, 1658. In an English bill for vicarage tithes in some towns in Kent, the plaintiff did not set forth in his bill, how they became due to him,

* Hard. 130.

whether by prescription or endowment, as he ought to have done, and exception was taken to this at the hearing, after answer and depositions. And the exception overruled, because the defendant does by his answer admit him to be a vicar, and that the tithes in question are his due; but insists only on payment and satisfaction, *quod nota* says the reporter; for it has been often ruled contrary, it being the ground and foundation of the plaintiff's title.

To the like effect was the case of *Stone* v. *Ludlowe and others**, 1662, wherein a bill for tithes due to the complainant, as vicar and incumbent of in Essex, the complainant did not shew, how he was entitled to them, viz. by prescription, endowment, or otherwise; and the court held it good notwithstanding. As well in an action at law for tithes upon the statute of 2 Ed. VI. the plaintiff is not obliged to set forth his title, *quod nota* says the reporter; for it is against many precedents in this court, which I have known of Demurrers for that cause held to be good.

So also was another case in 1722, *Pye* v. *Rea* †, which was a bill by a vicar for tithes; the defendant admitted in his answer, that the plaintiff was intitled to all sorts of tithes, but insisted upon a special exemption; upon this admission the plaintiff was not obliged to shew any special title either by endowment or prescription, which, otherwise, he ought to have done.

Defendants holden to less precision than plaintiffs in setting forth their claims.

Defendants are not so strictly holden to precision in describing or defining the rights, which they set up against the claims of plaintiffs, as the plaintiffs are in setting out their demands, for it seems to be considered sufficient in an answer, to give the plaintiff notice of the general nature of the case to be made against him. In *Baker* v. *Athill* ‡, 1794, a bill was exhibited for tithes; and objections were taken to the answer, as being too loose; it insisted on a modus, without averring it immemorial, and admitting, that the defendant did not know how long it had subsisted. It was not stated at what time the modus was payable. The modus was stated to be for cows, milk, and calves; agistment tithe was admitted in another part of the answer to be due, which was therefore insisted on as contradictory to the modus set up.

Macdonald, Chief Baron. If this were a bill by the landholder to establish the modus, we should tie him down to an accurate statement of his claim; for he is bounden to know it before he brings it into court: but in an answer, the tenant is brought within a limited time to answer, whether he have any defence to make, and

* Hard. 321. † Bunb. 72. ‡ 2 Anst. 491.

if he give such a statement as will inform the plaintiff of the general nature of the case to be made against him, it is sufficient. The objections were overruled.

In *Wood* v. *Wray and others*, 1796, Lord Chief Baron *Macdonald* upon a loose defence of the like nature set up to a bill for tithes, thus spoke. The question submitted to the court is, whether the answer of the defendants have defined, with reasonable precision, the ancient estates in respect of which their several moduses are claimed? They have not given any description of the particular closes holden by them, otherwise than as lands of certain extent; they do not name the parcels, nor describe their boundaries. It is impossible therefore, upon this answer, to say which are the lands ascribed by them to each ancient estate, and covered by the modus attaching upon it. The description of the ancient estates, of which these lands are supposed to be parcel, is equally indefinite. They are not named nor described by boundaries, nor even by the names of the tenants of the other portions of those estates. All we know of them is, that they lie in some part of the township of T.; but there is no clue to lead us to discover their particular locality. It is very true, that in an answer considerable indulgence is shewn in setting forth the defence, and the evidence here makes the case more intelligible; but the defendant is not to lie by in his answer, and give a blind description, which the plaintiff cannot meet. There must be such reasonable precision in the description, as would enable a sheriff to give possession of the closes. Would this description be sufficient for that purpose? No issue could be directed upon this defence. The issue is in general in the words or nearly in the words of the answer; but here there is no description at all of the place covered by the modus. There is nothing therefore to try by an issue. Where there is an inaccuracy in the answer in describing the defence, an indorsement on the *postea* may remedy the error: here the description is totally wanting; an indorsement therefore could not assist the case.

Lord Chief Baron Macdonald's opinion upon the looseness of a defendant's answer.

In *Langham* v. *Sparflowe and others*, parishioners of St. Helens, London *, 1658, to an English bill for tithes of certain houses in London, according to the act of 37 H. VIII. c. 12. and to have a discovery of the improvements of rent; the defendants, in their answers, set forth a customary payment in lieu of all tithes; and exception was taken to their answers, because they did not dis-

Case on tithes in London.

* Hard. 130.

cover their rents *, but relied upon their answer *de modo decimandi*. And the court held, that the *modus* being alleged no otherwise than by way of answer, they ought likewise to have set forth the particulars of their rents, and answered to all parts of the bill; but, if the defendants had pleaded it, they need not have answered to any other matter. And so it was ruled, though objected, that if the proofs were against them upon the *modus*, they might then answer upon interrogatories, to the particulars.

Why in pleading moduses the value and quantities to be set forth.

The court of Exchequer in 1721, gave the reason, why, in pleading a modus, the value and quantities must be set forth. In *Gumley* v. *Fontbroy* †, the vicar preferred his bill for tithes; the defendant pleaded, that the plaintiff employed a person to collect the tithes, and that he the defendant paid the collector 5*l.* and did not set forth quantities and values; so the plea was overruled with costs; for this court never admits a plea, even of a modus, to cover the discovery of quantities and values, because the defendant may die before they go to examination, and then, tithes lying only in the personal knowledge of the party, there would be no way of coming to the knowledge of the particulars: and the case in *Hardress* was denied, and it was said it had often been so. So was it also decided in *Baker* v. *Planner and others* ‡, 1722, where, in a bill for tithes, an exception was taken to the answer, that the defendant did not set forth quantities and values; the defendant sets forth what titheable matters he had, and says, he had no other titheable matters whatsoever. Barons *Price* and *Page* thought this insufficient, and that he should have set forth particularly, that he had not such and such things as charged in the bill; and upon their opinion the exception was allowed. (But *nota*, this seems very extraordinary and contrary to the constant method of drawing answers.) Baron *Montague* thought it would be well enough, if the defendant said, he had no other titheable matters in the bill mentioned. But *nota*, then it might be thought insufficient, if there were (as is usual) a charge in general in the bill, that the defendant had divers other titheable matters.

Value and quantity must be set

It seems, that where an exemption is set up, the quantity and value of the tithes need not be set forth, as where a modus is set

* The answer, as stated in the decree-book, was in this respect as follows: "And all the said defendants did severally and respectively set forth by their said answers the particular rents of their houses, which they alleged to have been their ancient rents." An issue on the custom was directed to be tried at bar by a jury of the county of *Kent*, but the event of that trial I have not been able to discover.

† Bunb. 60. ‡ Bunb. 108.

up. For in 1776, Lord Chief Baron *Smith*, in *Jones* v. *Powlett**, said, that if an exemption of payment for tithes be set up by a defendant, he is not bounden to set forth the value and quantity of the tithes; but that in a case of a modus, the value and quantity must be set forth. forth in pleading a modus, not in pleading an exemption.

Perryn, B. remembered a case of a bill brought by a vicar: the defendant in his answer insisted, that the rector was entitled to the tithes in question, and the court of Exchequer determined, that he was not bounden to set forth the quantity and value; though he seemed to doubt the case of an exemption mentioned by the chief baron.

But, in the present case, an exemption to the answer had before been heard and allowed; and the same exception was now heard again; and therefore the court thought, that, in all events, the defendant was now bounden to answer to that exception; but they thought the answer sufficient and overruled the exception.

In other cases also do the courts hold a defendant to the strictness of setting forth the particulars and value of the tithes sued for, as in *Cage* v. *Warner*†, 1661. The bill charged, that the plaintiff in the month of May, 1658, became incumbent of the church of Bearested in Kent, and that the defendants in June 1658 and 1659, by colour of an order of sequestration made by the committee in the county of Southampton, as they pretended, had seized divers tithes of divers parishioners within the plaintiff's parish, due to the plaintiff; and to discover the particulars of the tithes so taken, and their values, and to have them paid to the plaintiff was the scope of the bill; to which the defendant demurred, because it was a matter determinable at law, and a criminal matter; but the court put the defendants to their answer, because it was a matter of discovery; as in the case where a man by colour of a title enters into a house or lands, and possesses himself of the goods and profits; it may be impossible for the plaintiff to discover the particulars without such a bill: nor is it a charge by way of trespass, but under colour of title; so where a will is proved, and administration to another revoked, such a bill is necessary, and usual for the goods, and yet there was in strictness of law a trespass; so here. Strictness required of plaintiffs in setting forth the particulars and value of tithes sued for.

It frequently happens, that bills and answers require to be amended in different stages of the cause. In *Berney* v. *Chambers*‡, 1727, leave was given to amend an answer to a tithe bill, wherein Of amending bills and answers.

* 3 Gwill. 1100. † Hard. 183. ‡ Bunb. 248.

the defendant had sworn, that such a close contained nine acres, and to make it seventeen, though issue had been joined, and a commission had issued, (the reporter never knew it done before;) but it was upon the defendant's paying all the costs since the answer, swearing the answer over again, and taking out a new commission at his own expence *.

But then in a recent case, 1782, *Willis* v. *Fowler and others* †, a bill was filed for an account of tithe hay. The defendants, the occupiers, alleged, that their lands were covered by a modus of fourpence a yard-land, stating that such a modus had immemorially obtained for all the lands (except certain described lands,) lying on the eastern side of an ancient road, (describing it) running through the western part of the parish, and alleging their lands to lie within such modus district.

Court now more difficult in allowing amendments of answers.

The plaintiff objected, that the modus was ill laid, because it did not state what was payable for any quantity less than a yard-land. It was urged in answer, that all the defendants except two appeared to occupy whole yard lands, and of those two, one a half, and one three quarters of a yard land. That it ought to be presumed, that proportionable parts are payable for broken yard lands; and that the issue might well be directed; as the usual liberty to indorse on the *postea* would enable the verdict to be returned to the court in a satisfactory manner: or the court might direct the issue with the additional words of "so in proportion," or the like: or the defendants might, according to the late practice, be permitted to amend their answer in this particular. The court intimated a disinclination to allow the amendment, saying, that it had never been done without consent, and that the late indulgencies as to such amendments had led to some inconveniences, which had made them somewhat repent of introducing the practice, and would make them cautious in granting such indulgencies for the future. As to directing the issue more complete than the allegation, that they denied to be usual except as to trifling particulars, where the evidence in the cause authorized the alteration, such as where the defendant alleged a modus payable quarterly, and the evidence proved payments half yearly; there, the issue was alleged on a modus payable half yearly. As to the effect of the indorsement on the *postea*, the court said, it had never been the

* But *nota*, since in the case of Mr. *Wortley Montague* v. , the court refused to let the defendant amend his answer, by only altering the day of payment of a modus, although issue were not joined, and the day set right in the cross-bill.

† 3 Gwil. 1242, MS.

practice to direct an issue on a modus had upon the face of it, because it might happen, that the jury would find the verdict for the modus without more, and then a modus would be found on which the court could make no decree. But on enquiry as to the real fact, (on which the evidence threw no light,) and the solicitors being uninstructed, and because the question related to a considerable district, it was proposed by the court, and agreed to by the parties, that the cause should stand over in order to obtain better instructions as to the fact. Afterwards, in Trinity term, the inquiry having been made, the court were informed that the payments had in fact been in proportion to the fractions of a yardland, that is, twopence for half, and one penny for a quarter. Leave was therefore given (*by consent*) to amend the answer immediately, and an issue was directed according to the allegation so amended.

Demurrers do not often occur in tithe causes.

We have before observed, how by a demurrer a short end is put to the whole suit. Grounds of demurrer do not very frequently occur in tithe suits. It was observed by Lord *Hardwicke* in a case before referred to, *The Archbishop of York* v. *Sir Miles Stapleton*, that when a defendant will take advantage of defects in form by demurrer, he must do it before he puts in his answer; it is too late to make the objection after he has answered. In *Baxter* v. *Knollys* *, 1750, before Lord *Hardwicke*, a bill was brought for a partition of tithes and casual profits in the *Isle of Wight*.

Demurrer thereto; and 5 Co. cited, that there were no casual profits, and that it might be divided by writ of partition.

Lord Chancellor *Hardwicke*.

Ejectment lies of tithes.

An ejectment will lie of tithes, of which the execution is a writ of possession; and the sheriff may do as much on partition, as on a writ of possession on ejectment. This is not casual, whether tithes will arise or not. I do not doubt but this court can divide them, as it may several things, which cannot at law. Overrule the demurrer.

Demurrer to a bill against 15 defendants for tithes allowed, because it is maintenance for parishioners to defend jointly.

From the necessary similarity of tithe causes, the following case upon a demurrer being allowed to a bill, praying a discovery whether parishioners did not defend jointly, must prove interesting. In *Oliver* v. *Bakewell and others* †, in 1792, the plaintiff as rector of *Swepston*, filed his bill against fifteen defendants, occupiers of land within the parish, for an account and payment of tithes; as to some of the defendants from 1st January, and as to others from the

* 1 Ves. 494. † 4 Gwil. 1381.

5th April, 1791; and the bill alleged, that the defendants pretended, that their lands were exempt from the payment of tithes, or that some modus or moduses had been payable from time immemorial in lieu of tithes within the parish; whereas the plaintiff charged the contrary of such pretences to be true, and that tithes were payable for all the titheable matters arising on the defendants' lands during the times aforesaid. The bill also alleged, that the defendants pretended, that an agreement had been entered into between them and the plaintiff to pay him a composition in lieu of tithes, but that in fact no such composition had been entered into, and that the plaintiff had given the defendants respectively six months notice in writing, that he would take his tithes in kind, as to some of the defendants from the 1st of January, and as to others from the 5th of April, 1791; and the bill charged, that the defendants had entered into some agreement to resist the plaintiff's demand of tithes, and jointly to contribute to the expence of defending any action or suit, which might be commenced by him for the recovery of them.

The defendants, as to so much of the bill as sought a discovery from them, whether they had not entered into some and what agreement to resist the plaintiff's demand of the tithes in the bill mentioned, or to pay jointly, or to contribute to the expence of any action or suit, which might be commenced by the plaintiff for the recovery of the said tithes, demurred; and for cause of demurrer shewed, that the same was a matter touching which, the defendants ought not to be compelled by a court of equity to make any discovery: inasmuch as a discovery of such a matter might tend to charge the defendants criminally. As to the rest of the bill the defendants answered.

Burton and *Hollist* for the defendants admitted, that where several persons have one common right, it is not illegal for them to contribute jointly to the expence of any suit, in which that right comes in question. But, they contended, that the defendants had not in this cause any common right, which they could defend. Every defendant might have a different ground of defence; one might avail himself of an exemption of payment of tithes; another of a parochial modus; and a third of a composition; in which case it would be illegal for them to contribute jointly to those different defences; that the bill in this case proceeded upon the idea of the defendants having different defences; for that the plaintiff had given different notices to put an end to compositions at different times: that the defendants must have either different

defences, or the same defence; if different, the discovery would subject them to penalties: if the same, the discovery was immaterial: in either case, therefore, it ought not to be made.

Partridge and *Romilly* for the plaintiff, argued, that it was legal for persons to contribute jointly, not merely to defend, but even to commence suits to establish or maintain any right, which they claimed in common, as was decided in Lord *Howard* v. *Bell*, (Hob. 91. Br. Maintenance, pl. 41. 1 Hawk. P. C. 251.) *Potts* v. *Durant*, (before mentioned:) that the occupiers of land in a parish had a common interest to resist the rector's establishing his right to tithes; that it was only on the ground of their having such a common interest, that a parson could join several occupiers of land as co-defendants in a bill; and that if they had not such a common interest, which they might jointly contribute to maintain, the defendants would have a much better ground of demurrer than that which they had put on the record, namely, that the plaintiff had joined several matters, which concerned only some of the defendants in the same bill, *Sharpe* v. *Carter*, (3 P. Wms. 375:) that if the defendants had one common interest, it would not be maintenance for them to contribute jointly to each other's defence, though they might likewise have distinct defences: that the discovery being immaterial was no ground of demurrer, but of a reference for impertinence; but that in fact the discovery was not immaterial, and might have great weight with the court hereafter as to the costs of the suit.

The court, (*Eyre*, C. B. being absent,) without calling on the defendants' counsel to reply, allowed the demurrer.

It was before noticed, in the case of *Taylor* v. *Crathorne*, that where upon arguing a demurrer to a bill for tithes in the exchequer the court was equally divided, the demurrer was by the usage of that court overruled.

The doctrine of demurring to a tithe bill was more fully gone into in a late case in the exchequer *, in 1792, than in any other that occurs in the books. In *Bowman and others* v. *Lygon and others*, a bill had been filed by the defendants against the present plaintiffs for tithes, describing themselves to be impropriators of the rectory of the parish. The answer denied their title as impropriators. The doctrine upon demurrers fully gone into.

The present was a cross-bill, to obtain a discovery of the title of the defendants to the rectory, and praying a production of the title

* 1 Anst. 1.

deeds, &c. and particularly to have a discovery of the title of the defendants to agistment tithe; and whether the former occupiers of the lands of the plaintiffs had ever paid that species of tithe. The defendants demurred to the discovery sought, and put in an answer, insisting, that they were rightfully entitled to, and in possession of the rectory.

Burton and *Richards*, in support of the demurrer, argued, that the plaintiffs had shewn no title to have the discovery prayed; the defendants being in possession, the court cannot compel them to prove their title to the rectory. The plaintiffs do not even set up a counter claim to it, or pretend that any other is better entitled. In the case of *Selby* v. *Selby*, last term, the lord chancellor expressed a strong inclination to admit a demurrer to a bill, praying discovery of the title, under which the defendant meant to support his claim, an ejectment having been brought by him against the plaintiff in equity, who was tenant in possession of the premises; but the demurrer was bad on a ground of form †; an amendment was allowed, and was not then decided. The present case was much stronger: here the discovery was sought against the person in possession.

Lord Chief Baron *Eyre*. Certainly there can be no discovery, if it be prayed by the farmer merely to have a pretext for withholding his tithes altogether till the impropriator shall prove every item of his demand.

Abbott, for the plaintiff, took several objections to the demurrer. In form, it is overruled by the answer; the demurrer is to the discovery of the title, and the answer avers the goodness of the title. Amendments of demurrers are rarely, if at all, granted, and are quite out of the usual practice of the court. It is also bad in substance: by the original bill and answer the title is in issue between the parties, and therefore on a cross bill the plaintiffs have a right to a discovery of it. *Doble* v. *Potman*, (Hard. 160.) Even by original bill they would have been entitled to it in this case: *Heathcote* v. *Fleet*, (2 Vern. 242,) *Morse* v. *Buckworth*, (ib. 443.) *Brereton* v. *Gamul*, (2 Atk. 241.) *Metcalf* v. *Harvey*, (1 Ves. 249.) *Moodalay* v. *The East India Company*, (1 Bro. Rep. 471.) From these cases it appears, that a party sued, or likely to be so, is entitled to pray a discovery, whether the party suing, or any other, have the right to the subject in dispute.

† They stated, that in that case the lord chancellor had permitted the defendant to amend the demurrer; but he does not seem to have done so. See the same case again before the court, 4 Bro. 11.

At all events the plaintiffs are entitled to a discovery, whether any payment of the agistment tithe were ever made by the occupiers of the lands now holden by them; a demurrer covering too much is bad *in toto.*

Burton, in reply. The answer does not overrule the demurrer. The discovery prayed and demurred to is of the particular nature of the defendant's title; the answer only avers, that they have a title, that they are lawfully seized, without saying how. In the case before Lord *Hardwicke*, *Metcalf* v. *Harvey*, the discovery was sought, for the purpose of defending the possession; here to disturb it: in all the other cases, the party praying the discovery had some interest in the subject of it; here none is pretended. If there be any slip in the form of the demurrer, it is open to the defendants to demur *ore tenus* on payment of costs, or the court may grant an amendment. It would be an extreme hardship if, by a slip of this kind, a party were obliged to discover the whole of his title, and set forth his deeds, as is here also prayed; and so to expose himself to the attacks both of the plaintiffs and of every other person.

Eyre, Ch. B. A demurrer *ore tenus* is only allowed upon new grounds; not where a demurrer in paper on the same points has already been overruled. If there were merits, one would be inclined to allow an amendment; but what rational objection can the defendants have to say what is the nature of their title, when they must prove it in the other cause? It is difficult to draw a line in what cases a discovery ought to be granted; as where the tenant is fearful of being harassed by different claimants of the impropriation. Here the title is put in issue by the original suit, and therefore the plaintiffs are entitled to have a discovery of the nature of it. But the court will exercise their discretion in allowing the plaintiffs to search into the title further than for the purposes of the suit. The rule laid down by Lord *Hardwicke* goes very far; and I should not be inclined to follow it to that extent, without examining further into the authority of the decision. But here the demurrer is bad upon other grounds, and it is unnecessary to go into that question.

Thompson, B. The demurrer is bad, as covering too much. The defendants are bounden to set forth, whether any payments of agistment tithe have been made by the predecessor of the plaintiffs in their farms. The demurrer was overruled.

In *Potts* v. *Durant and others* *, 1792, a bill was preferred in Demurrer

* 4 Gwil. 1351.

because the bill multifarious.

the exchequer against eight defendants, praying against all of them an account of tithes, and against four out of the eight as commissioners to set out glebe-land, upon a charge made in the bill, that the other defendants had for a long time occupied it, and had confounded the boundaries.

General demurrer by the four defendants, who were not charged with possession of the glebe, shewing for cause of demurrer, that the bill contained a multiplicity of matters, some of which did not relate to those defendants.

Lord Chief Baron. This demurrer is right in form and substance. In form it is a proper demurrer to the whole bill, because if it had been partially applied to the matter of the glebe, still the effect of it would have been, that the whole bill must have been dismissed, as against the defendants, by reason of multiplicity in that particular; for the bill must have been dismissed against them as to the tithes, with which they were charged, and that as against them is in fact the whole bill. At to the want of denying combination it is too late now to object to that omission; the old cases have been overruled, and probably at the time those cases had authority, the charge and denial were more particular than they are at present. In substance it is very true, that a bill may embrace matters quite distinct, affecting different defendants; but to sustain such a bill, it must appear, that the decision of one point is *involved necessarily* in the disposition of the other points, as may happen to very different estates in any general arrangement *of the same* trust. The case in *Hardress* * prepares us to think the matters in this bill are very distinct. If, indeed, the bill had charged that all the defendants had confounded the glebe, and therefore the tithes could not be gotten at, till the glebe was ascertained, such a case might have warranted joining the two next matters by their necessary connexion.

Hotham, B. and *Perryn*, B. concurred. *Thompson*, B. was absent.

The court were proceeding to allow the demurrer; but on motion for the plaintiff, citing (Mit. 174.) they permitted him to amend his bill on paying full costs.

Plea a more

The defence to tithe bills by plea is much more frequent than by

* Viz. *Burke* v. *Harris*, 1664, in which this illustration is made, "as if a person "should prefer a bill against several persons, viz. against some for tithe and against "others for glebe, this is nought. But for tithes only, it is well against several parishioners, because they are of the same nature."

demurrer. We notice therefore the principal pleas, that have been admitted or overruled with the reasons of the determination of the different courts on the several occasions. One of the most ordinary and general grounds of defence in tithe, as well as other causes, is the length of time during which a plaintiff may have slept over his rights. The statute of limitations, which in most of such cases is pleadable, and at once puts a stop to claims neglected, forgotten or waived for certain limited periods, and specifically for six years in money demands, is not pleadable in tithe causes: as in *Marsten* v. *Claypole and others* *, 1727, a bill was exhibited in the exchequer by a lay impropriator for tithes for about twenty-four years. The defendant, as to such part of the bill as prayed discovery and relief for any time before within six years next before the filing the bill or serving the *subpœna*, pleaded the statute of limitations, and that he did not promise to make any satisfaction for any tithes before the said six years. This plea was argued, and overruled *per totam curiam*; for the defendant, as to the tithes, is in the nature of a receiver or bailiff for the plaintiff, in which case the statute of limitations does not operate. Cited for the plaintiff, *Cro. Car.* 513, 1 *Saund.* 38. 2 *Saund. Webber* v. *Tyrrell.*

common defence to tithe bills than demurrer.

Statute of limitations not pleadable in tithe causes.

Cited for the defendant, *Cro. Car.* 115. *Hetley*, 111.

It was said in the case of *Quilter* v. *Mussendine* †, 1726, that the reason why the statute of limitations was not allowed to be pleaded in bar to a bill for tithes was, that the tithes were not of the nature of those demands that are intended to be barred by the statute; besides that plea allows the title; years shall not refer to the æra, but must be intended a solar year of 365 days. And it was said by *Hale*, Baron, That, as to the statute of limitations, he thought it might have been pleaded in bar to the discovery, if it could have been pleaded at all, which it could not; for that specialties are not barred by the statute, and tithes are of a higher nature.

Reason why statute of limitations not pleadable.

Yet the court of exchequer, in *Garrard* v. *Scholler* ‡, 1772, refused (without expressing any reason or principle of its determination) to decree an account of tithes further back than six years. The vicar of *Ramsbury*, in the county of *Wilts*, claimed all manner of tithes yearly arising in the parish; and stated, that the defendant for thirty years past, had occupied therein divers tenements and lands, which he had sown with clover and turnips, and had

Exchequer confined its decree to six years back.

* Bunb. 213. † Gilb. Eq. Rep. 228. ‡ 3 Wood, 415.

therefrom clover seed, and turnip seed, which he had sold and disposed of; that he had also a messuage and malt mill, in which he had ground malt, but that he had not paid the tithes of the mill, or of the clover seed or turnip seed during the said time, although he had had each of the said titheable articles in every year.

The defendant said, that the plaintiff had been vicar of the parish for thirty years past; that he was entitled to all the tithes, that his predecessors had enjoyed; that some years ago the defendant had purchased the fee simple of a small garden, orchard, and close of land in the parish; that he also occupied another cottage and close of land therein; that he had sown clover and turnips thereon; that in the cottage there was a hand-mill erected for grinding malt; that it was worked by the hands and labour of man; and that it was an ancient mill: and he contended, that no tithes were due, or had ever been paid in the parish, either for the clover seed, the turnip seed, or the mulcture of the hand-mill.

The court ordered the bill, so far as it sought an account of tithes above six years next before the filing thereof to be, and so far as it sought an account of the tithes of garden-stuff and the hand-mill to be dismissed with costs; and that an account be taken of what was due for the tithes of clover seed and turnip seed arising on the close, in the answer mentioned to have been in the defendant's possession from the beginning of six years next before the filing of the bill.

Discretionary in the court how far back they will decree account.

In the case of *Monoux and others* v. *Shish and others* *, 1756, a bill was filed for an account of tithes, which had not been paid for upwards of twelve years; when two of the Lords Commissioners, *Smythe* and *Wilmot*, thus expressed their sentiments: Lord Commissioner *Smythe*, This is a bill brought by Lady *Monoux*, as executrix of her late husband *Charles Jones*, for tithes from *Michaelmas*, 1728, to *Michaelmas*, 1739. It appears, that *Charles Jones* was entitled for life to one moiety of such tithes, and possessed of the other moiety under leases for eleven years, commencing at *Michaelmas*, 1728; but no demand was set up by *Jones* for such tithes in his life, or by his executrix at his death. In 1752, Sir *Charles Wake Jones* obtained a decree, establishing his right to a moiety of the tithes as next remainder man; and directing payment of such tithes from *Michaelmas*, 1739, against the said defendants, which were accordingly paid. It is clear, that a right to these tithes did belong to Mr. *Jones*; and that it was

* 4 Gwil. 1582, MS.

a legal one also: but he never exerted it. The question then is, whether, under the circumstances of the case, the court ought to relieve the plaintiffs against the tenants. As against *Shish*, there can be no relief, for he never received the rents; there is no evidence to charge him, nor was any indemnity promised by him. The loss then must fall somewhere. Where ought it to fall? Mr. *Charles Jones* is only blameable. It is objected, that these tithes had been paid before; if so, Mr. *Jones* was apprised of his right. But presumption of payment cannot take place here, for it is insisted, that they ought not to be paid. It is a right rule, that where a man is apprised of his right and does not assert it at that time, that he loses his right, as in the case of building on his land; and as Mr. *Jones* never asserted this right, which he was apprised of, he ought to lose it. But after the death of *Jones*, his executrix does nothing from 1739 till 1753; no demand at all during that time: length of time ought therefore to be conclusive against the plaintiff.

Lord Commissioner *Wilmot*. This is a clear case not to relieve. I never heard, that, except in infancy or coverture, tithes were ever carried back so far as this bill has carried them. To be sure it is often said, that the statute of limitations is no bar; but though that be so, yet it is discretionary in the court how far they will carry this claim back. If *Jones* himself, in 1739, had brought a bill for tithes from 1728, I do not think the court would have decreed it; if so, much less in the present case, where the executor of the person who deserted his right, brings the bill. Mr. *Charles Jones* knew his right, he did not assert it, and therefore it is a waiver of that right. But there are several additional reasons, why the plaintiff should not be relieved in this case, viz. there is no proof that *Shish* ever received tithes or rent for them: and if there be no reason for *Shish* to pay, much less shall the tenants pay. It was the fault of *Jones* to lie by, and suffer the tenants to pay the rent; his executrix shall not now come and demand it. Length of time operates in various ways. First, as presumption of payment. Secondly, as a reason, where a party is guilty of gross negligence, and rebuts his equity; and therefore it would be a very dangerous precedent to relieve in the present case.

In *Pettit* v. *Churley**, 1692, to a tithe bill in the exchequer a plea was put in, that the plaintiff was a Frenchman and not capable of a benefit by statute: but the court doubted. A reference in that

Plea of alienage.

* 1 Rayn. 72; from Bodd's MS.

case was made to 2 Rol. Ab. 348; which book has these words, "By the statute of 13 Ric. II. and 1 Hen. V. Frenchmen were "disabled from having benefices in *England*, and Frenchmen endenizened: but *quere*, if they continue of force to this day." With humble submission to Mr. Serjeant *Rolle*, I should presume, that without the aid of any statute, an alien is absolutely incapable of taking and holding any freehold right, which a subject might acquire by *induction*. This is offered upon the same grounds and principles, as what was before said * of the incapacity of an alien bishop's taking his seat in the house of peers. I state, but do not controvert the general opinion, that *alienage* is no impediment to a clerk in orders receiving *institution* from a bishop having lawful jurisdiction to *institute*; or, in other words, to confer a part of the pure spiritual power or jurisdiction in the church of Christ; which, it is hoped, has been fully proved *proprio vigore*, to produce no civil effect whatever.

Plea of non-residence.

Another sort of incapacitating or disqualifying plea, is that of non-residence, as in *Mills* v. *Etheridge* †, 1725, a bill by the lessee of *Matthew Hawes*, clerk, setting forth his lease, (dated Feb. 4, 1723,) for the tithes, &c. for 1724 and 1725, in the parish of *Simpson*, in the county of *Buckingham*.

The defendant as to the discovery of the quantity of lands he held, and what tithes he had in those years, and also as to the account, pleads, that it appears by the plaintiff's bill, that his lease was dated Feb. 4, 1723; then pleads the stat. 13 El. c. 20. touching leases of benefices, and other ecclesiastical livings with cure, and avers, that *Matthew Hawes*, clerk, the lessor, was absent from his benefice 80 days and more in one year, since the lease, and before the filing of the bill, viz. in 1724; that the church of *Simpson* is not impropriate, and that it is a benefice, or ecclesiastical promotion with cure; and therefore by such non-residence, and by virtue of the said act, the lease was absolutely void.

Now upon arguing this plea Baron *Price* was for overruling the plea, because it covered the discovery, which, according to the usage of the court, a plaintiff was entitled to, whatever exemption or discharge a defendant might have. But the Lord Chief Baron *Page*, and *Hale*, were of opinion, that the plea was good, extending even to discovery, because it amounted to an absolute incapacity in the plaintiff, which differed from the cases where the plaintiff was entitled of common right; and there is no necessity to aver,

* Antea, p. 321.

† Bunb. 210.

that the absence was voluntary, (for if it were otherwise, it lay upon the plaintiff to shew it,) or to aver that the absence was 80 days together, so the plea was allowed.

Special case where a plea of *non-residence* was allowed.

The case of *Quilter* v. *Mussendine*, referred to in Mr. *Bunbury*'s note, was determined in the next year, 1726, and is very fully reported by the Lord Chief Baron *Gilbert* *, and in a manner that developes the whole doctrine of such a plea. A bill for a discovery of tithes was filed by the lessee of a parson. The defendant pleaded 13 Eliz. c. 20. against non-residence in bar. *Ward*, for the plaintiff, objected to the plea.

First, That it was bad in substance, for that it did not shew, that he was not of necessity, or justifiably absent, (barely saying he was voluntarily absent not being sufficient,) as he might have done according to *Butler* and *Godal*'s case, 6 Co. 21. b.

Secondly, The time of absence the statute requires to avoid the lease is 80 days and more, which ought to appear to be a continual absence for 80 days altogether, and at one time. 1 Bulst. 111. *Shepherd* v. *Townslie*, Mo. 436.

Thirdly, Though the plea should be thought good in substance, yet it could be no bar to the discovery, though it might as to the relief; to prove which he mentioned the case of a modus pleaded in bar to a bill for tithes, in which case it was holden, that although the plea were good as to the relief, yet it was no bar as to the discovery; but that the defendant must answer, and shew the quantity, quality, and value of the tithes; and the reason upon which that has been so resolved is, because if the defendant's plea in bar should prove to be false, the plaintiff then is to have a discovery from the defendant upon oath, and they will not let him run the hazard of losing such discovery, which he might do, if the defendant should die in the mean time; and that in Hilary term last, the court would not allow a plea of the statute of limitations to be a good bar to a title for tithes.

Fourthly, *Edlin* objected, that they had set out the year wrong in the plea, and that it did not appear, that he was absent for above 80 days, in any one year, taking the year to commence, according to the computation of the æra upon the 25th of March, (that is, by the computation of the old stile,) as he insisted it ought.

Bunbury and *Bootle*, for the defendant, to what had been said gave the following answers: As to the first objection, that if he had any good excuse for his absence, it being a thing lying entire-

* Gilb. Eq. Rep. 228.

ly within his own cognizance, they need not take notice of it, but he must shew it in his replication. And the whole court held the same.

Secondly, The construction they contend for would entirely defeat the statute, for at that rate, he needs only be there five days in the whole year; as to the opinion in *Bulstrode*, it is only that of two judges *obiter*; and as to *Moor* 436, the *insimul ac pariter* are in the special verdict, but no notice taken of it, that it was necessary they should be in.

Thirdly, They distinguished this from a plea of a *modus*, for that admits the plaintiff's title to the tithes, but only avoids the payment of them in kind, for that by custom, he was to have something else in lieu of them: in that case the demand is allowed to be just; and the only question is, in what manner that demand is to be satisfied? But the plea in the present case denies and defeats all the plaintiff's right and title to the tithes, and to any manner of satisfaction for them. The plea of the statute of limitations was also very different from this, for that statute could not be extended to a demand for tithes.

Fourthly, That the year was to be 365 days, without reckoning it from the 25th of March; and they insisted upon the case of *Etheridge* and *Mills* in this court being in point.

Gilbert, Chief Baron. The case of *Etheridge* and *Mills* cannot be distinguished from this. 2dly, The case in *Bulstrode* is not law, for that would defeat the statute *causa qua suprâ*. 3dly, That this was a good plea in bar, both as to the discovery and relief. As to the case of pleading a *modus*, that allows the plaintiff's title, and so that is pleading against what you allowed before.

The reason why the statute of limitations was not allowed to be pleaded in bar to a bill for tithes, was, that tithes were not of the nature of those demands, that are intended to be barred by the statute: besides that plea allows the title; years shall not refer to the *era*, but must be intended a solar year, 365 days.

Price, Baron, agreed the year shall be 365 days, and the absence any 80 days within that compass.

As to the second objection, how inconvenient it might be to allow such plea a good bar, as to the discovery; for that supposing the plea to be false, if the defendant should die, the plaintiff might lose the benefit of a discovery, the answer was very plain; for the defendant having here shewn, that the plaintiff has no title to the tithes themselves, he in consequence can have no title to a discovery concerning them.

Page, Baron. The plea of a *modus* is an acknowledgment of the title of the plaintiff; and in part a discovery itself; for it sets out he is to pay so much for corn, so much for pigs, &c. and then it is nothing strange, he should be compelled to go on a little farther and shew the quantity and number of his corn, pigs, &c.

He took the distinction to be between a plea acknowledging the title, and one which absolutely denies it. If a bill be brought by an heir, claiming by descent against another, suggesting some fraud, and praying a discovery, there if defendant plead he is a purchaser for valuable consideration, such plea, which goes to the plaintiff's title is always good, both as to the relief and discovery. So in case of a bill for an account against one as bailiff, suggesting fraud, if the defendant plead, that at such a time he did account, he needs not go on, and set out an account: and he also agreed as to the computation of the year.

Hale, Baron. That the plea is a good bar to the discovery, and that the case of a *modus* had been rightly distinguished from this. As to the statute of limitations, he thought it might have been pleaded in bar to the discovery, if it could have been pleaded at all, which it could not; for specialties are not barred by the statute, and tithes are of a higher nature.

And he farther said, "that no constructions could be too liberal, to make parsons reside, and take care of their parishes."

Pleas of abbey lands.

Since by the acts of Hen. VIII. so large a quantity of tithes has come into lay hands, which formerly belonged to monasteries and other spiritual corporations, that were entitled to certain privileges and exemptions, it follows, that pleas may be often used by persons making title to such tithes from or through the patentees of the crown, which meet no other tithe cases; as in *Burslem* v. *Burbage and others* *. To a bill for tithes, the defendants pleaded as to part, and answered as to part; and by their plea they set forth, that the tithes in question formerly belonged to the monastery of Boardesly, which was one of the greater monasteries dissolved *anno* 31 H. VIII. and that by the act of parliament of that year all the possessions, &c. of the said monastery became vested in the crown: that H. VIII. granted them away, and that by divers mesne grants, conveyances and assurances in the law, they became vested in the defendant. Objection was taken by *Sewyn* to this plea, because the several conveyances were not set out; but it was answered, that this was sufficiently certain even at law: that

* 4 Gwil. 1324, MS.

upon the evidence they would be bound to deduce a regular title; and of that opinion was the court, and allowed the plea.

Certainty in pleading moduses exemplified in overruling a plea of an ancient mill.

It is frequently necessary in tithe suits to plead moduses, and we have had frequent occasion to refer to the certainty required in pleading as well as in laying them. In 1743, Lord *Hardwicke*, in overruling such a plea for uncertainty, entered rather fully into the reasons of his judgment in *Talbot* v. *May**. The bill was brought for tithes of a mill, and a plea of a modus of 6*s*. 8*d*. for the mill, when it was part a corn-mill, and part a fulling-mill. In 1719, the fulling-wheels were taken away, and a pair of mill-stones put in their room, and it had been since a corn-mill.

Mr. *Attorney General* for the plaintiff. It was anciently a fulling-mill, and the corn-mill and the fulling mill are now under the same roof, and the *modus* cannot extend to cover a new erected mill, for as it is altered to a corn-mill, it must pay tithe in kind.

Mr. *Hamet* of the same side cited 1 Rolls Ab. 662. 3 Bulst. 312. 1 Brownl. 32. Cro. Jac. 523, and the case of *Nutt* v. *Chamberlayn*, heard first in the exchequer, and heard afterwards in the house of lords, where it was determined, that every water corn-mill must pay corn as a personal tithe. Mr. *Talbot* of the same side cited 1 Rolls Abr. 656.

The counsel for the defendant insisted, that the modus covers the mill, let the engine of the inside consist of wheels or of stones, and therefore changing the working part makes no variation, but the modus will still cover it, as it is a mill, though of a different kind. They cited 1 Rolls Abr. 641. and 2 Inst. 490. That adding new stones to ancient mills will not alter the *modus*, nor destroy it, where the stones are under the same roof; they cited Carth. 215.

Lord Chancellor. The plea in this case must be considered both in respect to the form and substance; and upon either it cannot stand, for as it is not *ad idem*, it is impossible to know to what it is applicable. Here are three mills charged by the bill to be working mills: the defendant pleads a *modus* to one only, called *Birdlep* mill. All of them at present as used are corn mills, and therefore the plea is quite uncertain; if this point could be laid aside, which I cannot do, consider it next upon the substance. I will consider them as two new corn-mills, but under the same roof. Suppose, first, an ancient mill under a building worked with

* 3 Atk. 17.

one wheel, and the owner, under the same roof, thinks proper to erect two new wheels and two new stones; I am of opinion, this is to all intents and purposes two mills, and he cannot cover them with the same *modus*; you might as well say, he might erect another mill upon the same stream, and call it one mill.

Suppose two ancient mills in the same parish, which paid tithes in kind, and another miller who had a fulling-mill covered with a *modus*, should turn it into a corn-mill. It would prejudice the parson in the other mills, as the new erected one would diminish the trade of those mills, and the parson suffering by those means, ought to be recompenced by the payment of tithe for the mill so converted. The reason the cases go upon, why a *modus* is destroyed, where two stones are erected instead of one, is, because the miller can grind a double quantity.

Consider it in another light: formerly there were two fulling-mills, and a corn-mill under the same roof, and the fulling-mills now turned into two new corn-mills; this is just the same thing as if he had erected two new mills.

The fulling-mills can only pay a personal tithe, because it is only in the nature of a trade; but where there are corn-mills, each is to pay a tenth dish. In this case, thus much must be shewn: that there was a custom in this parish for fulling-mills to pay tithes, or otherwise they do not properly pay them. The only colourable thing is, it was an ancient *modus* for the land, and that the mill is but an accidental quality. But it is not pleaded for the land only, but as a conjunct *modus*, both for land and mill too, and therefore let the plea be overruled.

It is a general rule in pleading, that where the defendant answers to what is covered by the plea, the plea shall be overruled, and this rule was verified in the case of *Blackett, Bart.* v. *Langlands* *, A. D. 1792, where the plaintiff stated himself in his bill to be seised in fee of the rectory impropriate of St. *John*, otherwise *St. John of Lee*, in the county of *Northumberland*, and to be entitled to the tithes of corn and grain arising upon certain lands situated within the said rectory, called *Cocklaw*, which comprized three farms called *East-farm*, *West-farm*, and *Cocklaw-hill-head*; that the defendants were the occupiers of those farms, and had reaped corn, &c. that they pretended, that they paid 5*l.* a year as a *modus*; but the plaintiff insisted, that the 5*l.* a year, which he received was not a *modus*, but a quit rent; the bill therefore prayed

* 4 Gwil. 1638. MS.

that cause was heard before the master of the rolls, and it was ordered to be referred to Mr. *Bennett*, to take an account of what was due to the plaintiff from the defendants, for all the tithes demanded by the plaintiff's bill, and that they should pay him, what should respectively be found due from each of them.

And in pursuance of the decree, the plaintiff had left with the master, three distinct charges against the three several defendants, and examined witnesses in order to support his charges, and also exhibited interrogatories before the master for the examination of the defendants, who had each of them put in their several answers and examinations to the interrogatories.

And in regard the plaintiff was by his present bill seeking the same relief and discovery, as he sought by the former bill, and as was already provided for him by the decree, according to the usage of the Exchequer in cases of this nature; the defendants do therefore plead the former bill, answers, decree, &c. in bar to so much, and such part of the plaintiff's bill as aforesaid.

Mr. *Atkyns* in support of the defendants plea, said, that the second bill must have been brought either for vexation merely, or have proceeded from ignorance or want of knowing the practice of the court; for he apprehended, there was a material difference between the decrees of the Exchequer, for an account of tithes, and the decrees of chancery; that in the Exchequer they are directed to the time of filing the bill only, but here to the time of the master's report.

The Lord Chancellor seemed to be of this opinion in the case of the *Archbishop of York* v. *Sir Miles Stapleton and others*, *Feb.* 21, 1740. That was a bill brought for an account of tithes, and to establish the custom of setting out corn in stacks; his lordship directed an issue to try the custom, and said, though it would be time enough to search for precedents as to the manner of directing the account, when the cause should come back after trial, yet he took the difference between the course of proceeding in the court of chancery, and the court of exchequer to be this, that there they direct an account of tithes no further than the bringing of the bill, but here the rule of the court in general is, where an account of tithes is decreed, that it shall be carried down even to the time of the master's report, and not to the filing of the bill only.

Decrees in exchequer go no further than the bringing of the bill, in chancery to the master's report.

Mr. *Atkyns* observed further, that the rule is the same in similar cases, where the account is to be taken; and that in the case of *Bulstrode* v. *Bradley*, *Michaelmas* term, 1747, lord chancellor was pleased to say, "it is the constant practice of the court, in de-

crees against a mortgagee upon a bill for redemption, or against any executor to account, to direct it without future words; and yet if the person decreed to account, receive any thing subsequent to the decree, it is enquirable before the master, equally with sums received before the decree."

That if this be the practice, the plaintiff, by the decree in this first cause, may carry the account full as far under the first suit, as he can under the second, and consequently the last is multiplying suits unnecessarily, without any advantage to the plaintiff, or answering any end, but what he has already, or might have obtained under the *former decree*.

Mr. *Baron Clark*. The defendant's plea of a former suit depending for the same matter ought to be allowed, or otherwise the defendant may be put to double expence and double vexation, as possibly, if the second cause were to proceed, the decree might be different from the decree in the former suit.

As to the difference in practice between the two courts, the Exchequer and chancery, it is undoubtedly such, as has been insisted on by the defendant's counsel, and in decrees for account of tithes in the court of chancery, they are not drawn up differently from decrees to account in other matters, but are general, to account for all tithes that are due, without specifying any particular time charged in the bill, or limiting the account to any certain determinate time.

And as, according to the practice of this court, an account for tithes may be carried on as long as the suit is depending between the parties; it would be vexatious, if the plaintiff should be allowed to proceed in a second bill for the same individual tithes; I ought therefore to allow the plea, as to the particular period of time covered by it, the 28th of April, 1746, the time when the cause was heard and decree made; and it was allowed accordingly.

Motives for obtaining and setting up collusive decrees.

As the courts have gone the length of generally shutting out the claims of incumbents, when their rights have been before a court of competent jurisdiction, and they have actually decided or decreed upon them, it is obvious, that the only conclusive security either for or against the church is the decree or judgment of a court; and it is to be apprehended, that in some instances undue efforts to obtain a decree or judgment of the court, have been too successfully attempted. We before * observed, with reference

* P. 197.

to moduses, which were the general ground of most suits between the parishioners and clergy, that in the establishment or evasion of moduses were to be traced most of the attempts to deprive the clergy of their due, or of parsons impropriate or others, to acquire more than the law had actually given them. As there may be a possibility in a suit in equity of procuring the consent or acquiescence of an incumbent from personal interest, where that may be required to give binding effect to a decree, and the neglect, laches, or even wilful omission of the incumbent, may in possible cases become fatal to the interests of his successors, the only mode of removing the effects of such a decree is for the incumbent to impeach it with fraud, and charge, that it was obtained by collusion. And where that is so charged, if the defendant do not in his plea of the former decree, deny the fraud by way of averment, the fact of fraud will not be put in issue, and the plea will be overruled.

Where a collusive decree not well pleaded.

This was established in 1780, by Lord *Thurlow*, in *Davie* v. *Chester* *, and recognized and confirmed by Lord *Eldon*, in 1805 †, in *Dods* v. *Worrall*. In 1756 ‡, in *Chester* v. *Taswell*, before Sir *Thomas Clarke* master of the rolls, Mr. *Chester* and several land owners of the parish of *Aldmondsbury* in the county of *Gloucester*, exhibited their bill against Mr. *Taswell* the vicar, to establish certain moduses. The Bishop of *Gloucester* though patron, was not made a party to the bill, either as patron or ordinary.

Bill of Chester and others to establish moduses.

The complainants set forth by their bill, that the vicars of *Aldmondsbury*, by endowment, ancient usage, or otherwise, were entitled to receive tithes in kind of *wool*, *geese*, *honey*, *and eggs*, and of *calves*, *lambs*, *and pigs*, when 10 or more; that the vicars had never within the memory of man been entitled to receive tithes in kind of *hay* or *meadow*, *milk*, *foals*, *gardens*, or *orchards*, or of *calves*, *lambs*, or *pigs* when under 10, but that in lieu thereof the following moduses had been immemorially paid by the land owners to the vicars, viz. for every yard-land of meadow the sum of 1*s.* and no more.

For every half yard-land of meadow, the sum of 6*d.* and no more.

For every acre under the quantity of half yard-land of meadow, 2*d.* and no more, arising from such meadow.

For the milk of each cow 2*d.* and no more.

For the milk of each heifer 1*d.* and no more,

* Mitf. Plead. 217. † Mich. MS. ‡ MS.

For the fall of every foal 1*d.* and no more.

For every calf weaned under 10, 1*d.* and no more.

For every calf sold under 10, 2*d.* and no more.

For every garden and the fruits thereof, 1*d.* and no more.

For every orchard and the fruits thereof, 1*d.* and no more, payable on the usual days of payment, there accustomed, or as soon after as demanded. That after the induction of Mr. *Taswell*, they paid to him tithes in kind of *wool*, *geese*, *eggs*, and *honey*, and of *calves*, *lambs*, and *pigs*, when 10. And that they tendered Mr. *Taswell*, the above-mentioned moduses for the lands in their respective holdings in lieu of hay or meadow, milk, foals, gardens, and orchards, and the fruits thereof, and of calves, lambs, and pigs, when under 10, which he had refused to accept. That these moduses were accepted by John Smith, vicar, in 1633, and by *Hayne*, his immediate, and his several other successors, in the vicarage. That in 1707, the return of the value of the living for Queen Anne's bounty was 42*l.* 3*s.* 10*d.*; whereas the then value of tithe in kind would have been 400*l.* per annum. They prayed to have the moduses established by a decree of the court, and that they should be quieted in the enjoyment thereof, and for general relief.

Taswell's answer.

The defendant *Taswell* by his answer admitted that the complainants had insisted upon these moduses, that he had heard and believed, that such payments had been made by the land owners and accepted by some vicars, alleging, that having been but lately instituted, he could not set forth, whether they had constantly been paid to and accepted by his predecessors, and driving the complainants to their proof, and claiming tithes in kind not only of the enumerated, but of all other titheable matters within the parish. He admitted that *Smyth* and *Haynes* were vicars, and that he had heard and believed, that they had received these moduses, but could not set forth whether during the whole of their incumbencies or not, nor in fact, how long they were vicars respectively. That he had seen some books, which he was informed and believed were in possession of Mr. *Mosley*, vicar, his immediate predecessor, by which it appeared, that for several years the sums mentioned in the bill had been paid to, and received by Messrs. *Smyth* and *Haynes*; but how far these books were evidence of these payments being made, as, and for the moduses insisted upon by the bill he submitted to the judgment of the court. But he did not know, whether these payments were accepted by the succeeding vicars or not: nor whether the land owners did or did not

compound with succeeding vicars for their tithes mentioned in the bill. But he had never heard of any tithe being taken in kind of *hay* or *meadow*, *milk*, *foals*, or of *calves*, *lambs*, and *pigs when under ten*, *or of gardens or orchards*. He admitted the return made for Queen Anne's bounty, but could not set forth whether the tithes in kind would or would not have amounted to 400*l*. He had heard, that some vicars had made compositions with their parishioners for their tithes, but knew not, whether they were made on the foot, or calculation of the moduses in the bill insisted upon or not. He had also heard, that the annual value of the vicarage during such compositions, was between 50 and 60*l*.; but contended, that he was not bounden by such compositions whatever they might have been: he admitted, that these payments had been tendered to, and refused by him, and insisted upon being entitled to tithe in kind of all titheable matter throughout the parish.

Decree establishing moduses without costs.

The plaintiffs replied to the answer: the defendant rejoined, and witnesses were examined on both sides. And upon opening the pleadings, and hearing several exhibits and the proofs taken in the cause read, and what was alleged by counsel on both sides, and the defendant *Taswell* declining to try the several moduses on the 25th of January, 1759, his honour declared they ought to be established and decreed accordingly without costs on either side. How long this Mr. *Taswell* survived the decree made by Sir *Thomas Clarke*, appears not upon any of the books, or MS. reports which have come within my cognizance. Nor does it appear whether Mr. *Davie*, the vicar of Almondsbury, in 1780, were the immediate successor or not to Mr. *Taswell*. Lord *Redesdale*, in his valuable treatise on pleading in Equity *, has given the following short note of that case. In *Davie* and *Chester*, in Chan. March 10, 1780, a decree establishing a modus having been pleaded in a bill for tithes, in which the plaintiff stated, that the defendants set up the decree as a bar to his claim, and to avoid the effect of the decree charged, that it had been obtained by collusion: the chancellor was of opinion, that the defendants not having by averments in the plea denied the collusion, although they had done so by answer in support of the plea, the plea was bad in form, and he over-ruled it accordingly. A fuller note of this case will, it is presumed, be acceptable to the reader †.

Lord Redesdale's report of the case of *Davie* v. *Chester*.

A fuller manuscript note of same case.

Davie v. *Chester*. Bill by vicar for tithes. Defendant put in a

* Mitf. 217.

† This MS. note was kindly communicated to me by Sir *Samuel Romilly*.

plea of a decree in 1759, in a cause wherein the parishioners were plaintiffs, and *Taswell*, the vicar, (plaintiff's predecessor) defendant establishing a modus. For the plaintiff, it was said, that the decree was defective, the patron not being made a party to it; and that therefore the decree, which could not bind the successor, was not matter of plea. That a vicar was not privy to the acts of his predecessor, nor bounden by them. That the decree might be produced indeed as proper evidence in the cause, and then the plaintiff would have an opportunity of shewing, that it was obtained by collusion between some of the parishioners, and the then vicar. Another objection made to the decree was, that the bill was not filed by all the land owners in the parish. For the defendant. In support of the plea, it was said, that such a decree stood upon record in this court, and while that remained unimpeached, the same question could not be agitated in another cause. That though it were true, that in an action at law, if such a decree had been pleaded it would not have been good, and would only have been matter of evidence. Yet in this court it was very different; it was the plea of a judgment of this court: that if the decree were obtained through error, the plaintiff had his remedy by bringing a bill of review; if by collusion, by bringing a bill to impeach its validity; but till that were done, and the decree disposed of, this court could not proceed in the present suit; for that would be to judge a matter already adjudged, and would occasion the inconveniences of having two contradictory decrees pronounced upon the same subject by the same court. That though it were a common opinion, that a patron was a necessary party to a cause establishing a modus, yet there was not in the books one decision to that purpose. That a vicar was privy in estate to his predecessor, in the same manner, as the heir or assignee of lands is to his ancestor or assignor. And for the defendants was cited *Bluck* v. *Elliot* *, Finch 13, a very strong case. March 9th, Lord chan-

* That case was as follows. "*Matthew Bluck*, Esq. *John Goodman*, senior, *Thomas Rogers*, and *Thomas Font*, plaintiffs. *Philip Elliott* clerk, defendant.

"The plaintiff's bill was for payment of a *modus* of 15*s*. 4*d*. per annum, in lieu of tithes, &c.

"The defendant as to so much of the bill as charged the payment of a *modus*, or any yearly sum of money, for, and in lieu of tithes, for any of the lands in the bill mentioned, (except out of H. meadow,) or that sought relief here against the defendant, for or concerning the same, or against the verdict obtained by the defendant against the pretended modus, or which sought relief touching any *record*, exemplifications, or abstracts, concerning the premises, for plea said, that the defendant then was, and for 20 years last past had been rector of the parish and church of *Hunsdon*, and duly in-

cellor, after minutely stating the proceedings in the suit, by which a modus had been established, observed, that it was not a suit

stituted and inducted, &c. and that in Michaelmas term, A. 12 Car. 2, an action of debt was brought by him as rector, &c. against *Thomas Rogers*, concerning the payment of tithes in kind upon the statute 2 E. VI. for the forfeiture given by that statute for not setting out his tithes, which said *Rogers* was then tenant of parcel of the lands, whereof the bill suggests the modus to be paid; and the cause coming on to a trial, the then Lord *Willoughby*, who was owner of the said lands endeavoured to support the pretended *modus* now insisted on by the plaintiff, and made all the defence he could in person, both on the behalf of himself and tenants, and especially of his tenant *Rogers*, against whom the said action was brought; but yet a verdict passed at the assizes against the pretended modus, on which verdict judgment was duly entered, which verdict and judgment the defendant pleaded in bar of the plaintiff's demand by this bill; and the court allowed the plea to be good."

It is to be observed, that there are very material differences between these two cases: 1st, the case in *Finch* was a verdict at law: the case of *Davis and Chester* was a decree in the same court. 2nd, No collusion or fraud was even suggested in the former case: the latter rests upon the charge of collusion and fraud. 3rd, The verdict and judgment in one case were in support of the common law right to tithes: the decree in the other case was against it. 4th, Lord *Willoughby* in the first case prosecuted the action *totis viribus* against the incumbent: in the last case the incumbent is charged with having abandoned or surrendered his rights to the injury of his successors. There is an important passage in the before mentioned case of *Carr* v. *Heaton*, from Sir *John Skynner's* MS. which throws strong light upon this subject. "It has been urged by the plaintiff's counsel with great force of argument, that a decree made between the same parties, on the same point, not appealed from, but signed and inrolled, is conclusive; and that as that decree made in the time of Car. I. had been signed and inrolled, the rights of the parties to that suit, who were represented by the parties in the present suit, namely, the vicar, and the impropriator were bounden by it; the merits of it could not now be discussed; and consequently, the plaintiff, (the vicar) was entitled to the decree, which he prayed by his bill.

"The rule is founded in sound policy, which requires, that the decrees of the court should not be contrary and opposite to each other on the same point of right; for instead of producing certainty and security, it would create the utmost confusion. But a decree, which is to have this conclusive effect, must be made between parties, who have a competent interest in the subject of it. The suit, in which that decree was pronounced, was between the vicar and the impropriator, who was the patron. One of the parties had an absolute right; but the vicar, though he had the freehold of the vicarage, had no interest beyond his own incumbency. As vicar he could do no act to bind the interest of his successors in the vicarage. Before the restraining acts he could not have affected those interests without the concurrence of the ordinary, as well as of the patron; and the same reason and policy require, that the ordinary should be a party to a suit, the end of which is to bind and conclude these interests, which the law has appointed him to watch over and protect. And though the decree, which was pronounced, were in favour of the vicar's claim, yet if there were not parties sufficient to sustain the suit, the decree pronounced in favour of the vicar can be no more conclusive, than if it had been to the prejudice of his claim. Considering the decree in this light, it has no more force in respect to the successors of the vicar, who was party to it, than a decree for an account of the tithes would have had. The conduct of the parties to the suit, or of their representatives, shews, that they considered the decree as not conclusive; and that they might at their pleasure depart from it."

brought on behalf of the plaintiffs, and all other owners and occupiers of lands in the parish, and that the plaintiffs, who were described as such, were not the owners and occupiers of all the lands referred to in the bill, and many who were really so, had not been made plaintiffs. That had the former bill been properly brought, he should have taken more time to consider of it. That he was of opinion no decree would bind the vicar's successors, where the patron had not been a party, and should therefore disallow the plea, but suffer it to stand for an answer with liberty to except.

Deds v. Worral. Plea of former decrée again overruled.

It is believed, that this suit abated by the death of Mr. Davie, very soon after the defendant's plea had been over-ruled: no proceedings appear on the records of the court from the year 1780, affecting the vicarial tithes of Almondsbury, till the year 1804, when the present incumbent filed his original bill against one of the most considerable land owners of the parish, in order to bring to trial the existence of these moduses, which all the vicars of Almondsbury have questioned or resisted. As the bill, however, is still pending, nothing can be said upon it, except that it impeaches very strongly the decree in *Taswell* v. *Chester and others*; and upon the like grounds, as Mr. *Davie*, the former vicar, had impeached it, and also demanded tithes in kind. In *Deds* v. *Worrall*, the defendant *Worrall*, as Mr. *Chester* had done, pleaded the former decree almost *totidem verbis*. It was set down for argument, and came on before Lord *Eldon* in Michaelmas term 1805, when the counsel for the defendant *Worral* (Sir *Arthur Piggott*) said, that they had not been aware of the case mentioned in Lord *Redesdale's* book of *Davie* v. *Chester*; but with that case staring them in the face, he would not consume the time of the court in arguing against it. Lord *Eldon* noticed the case, and fully recognised and confirmed the opinion of Lord *Thurlow*. He therefore disallowed the plea, but suffered it to stand for an answer with liberty to except.

Injunctions of courts of equity.

Courts of equity often grant injunctions to stay proceedings in the common law of courts, or to the spiritual courts, which operate nearly like prohibitions at common law. In Sir *Edward Blackett* v. Dr. *Finney**, 1724, the bill suggested, that there was a modus of four-pence per score for all sheep going on *Gayerfield*, in the parish of *Ryton*, in the county of *Durham*, in lieu of tithe of lamb and wool; that the defendant libelled in the spiritual

* Bunb. 176.

court for tithes in kind; that the plaintiff moved for a prohibition in the court of pleas in *Durham*, but permitted a consultation to go, and depended on relief in this court, and prayed to have the modus established: the defendant, Dr. *Finney*, insisted there was no such modus, but that the four-pence were in lieu of the milk of the ewes, which was usual in that country.

Now upon motion for an injunction to the spiritual court, the defendant's counsel insisted, that this was proper matter of suggestion on a prohibition; and also the defendant had in the answer denied the modus: but, *per curiam*, there being some dispute between the parties, whether the modus be as alleged in the bill, and as the spiritual court cannot try the modus, we will grant the injunction.*

Injunction denied where it would break in upon the authority of the spiritual court.

Yet in the before-mentioned case *Rotherham* v. *Fansbaw*, Lord *Hardwicke* denied an injunction to a defendant in the spiritual court, upon the following grounds: the defendant instituted a suit in the ecclesiastical court, for subtraction of tithes; the defendant, without pleading any discharge there, brings his bill in this court to establish a *modus*; the answer to the bill does not admit it, and the motion now is for an injunction to stay proceedings in the ecclesiastical court, upon the bare suggestion of a *modus* by his bill.

Lord Chancellor. An injunction is prayed on two heads; first, on a presumption for a constant non-payment of tithe hay from time immemorial; there must have been an alienation from the persons, under whom the defendant claims, though the plaintiff be not able to produce the particular grant of those tithes to his ancestors. Secondly, upon a suggestion in the bill, that there has been a *modus* or composition constantly paid in lieu of tithes.

Of issues sent to juries.

Having before observed, that most actions at law on tithe causes arose out of issues directed by the courts of equity, it will be our remaining task to notice the different instances, in which the courts of equity have directed them. In several of the cases hereinbefore referred to, occasion has occurred to notice instances, in which courts of equity have sent points of doubt to juries. We shall here draw the reader's attention to some of the more recent cases, in which these courts have acted upon established principles. In the before-mentioned case of *Ekins* v. *Dormer*, 1747, Lord

* June 6, 1733, *Salmon and others* v. *Rake, rector of Holcombe in Com' Somerset*: A like bill for establishing modules, some whereof the defendant admitted, but absolutely denied the most and greatest of them; and *per totam curiam* Sitwell, though the plaintiff here had not put in a plea to the libel in the spiritual court, yet since that court cannot try modules, and the bill prays an establishment thereof, an injunction was granted.

Hardwicke observed, as to one part of the case, that notwithstanding the particular *moduses* were not mentioned in the bill, nor particularly pleaded by the answer, yet as the plaintiff's own witnesses shewed a reasonable ground for a *modus*, it would be going too far to say, that an account of tithes should be decreed, where even upon the plaintiff's evidence it appeared, there was a modus.

Moduses not established without trial, if denied.

In the before quoted case of *Robinson* v. *Barreby*, 1779, the court of exchequer held, that customs never were established without trial at law, where the defendant denied them: unless the defendant should waive the issue tendered, which was allowed to be the practice on all hands. Then in *Morgan* v. *Neville*, which was before referred to for another purpose, Lord Chief Baron *Smith* said, it was an invariable rule, in questions of that sort, (the question there was of a custom to carry the tenth meal of milk to the church porch) to refer to a jury. It is only, where there is a doubt, that it is done both in cases of moduses and of customs. And Baron *Adams* declared he was not perfectly satisfied to decree without a trial at law. Lord *Mansfield* in his elaborate argument in *Travis* v. *Oxton*, before the lords in 1775, from *Eyre's* MS. said, "I know of no case, where courts of equity decreeing on "right, do not go on this ground, that *it is clear beyond contradic-* "*tion and without a possibility of its being otherwise.* But there is "a leaning in all juries to determine against tithes: therefore there "are many precedents, where, upon the evidence coming home "quite clear upon a modus set up, or a right, a decree has been "made without sending it to a jury." In *Warren* v. *Fisher* *, 1785, where a modus was laid in a vague manner, that is, an entire modus of 5*d.* for two species of tithes, viz. for cow and calf, and the distribution of 4*d.* for one and 1*d.* for the other resting on the evidence of one witness, and a *viz.* in some written document, the court declared, they could not direct an issue for want of precision in the statement of the modus. The case of *Laithes and others* v. *Christian* †, 1734, was a bill for establishing a modus; it was proved to exist with some variation (as to extent and time of payment) from the statement in the bill, yet the court directed an issue to try it. But Lord Chancellor *Thurlow* said in *Bishop* v. *Chichester*, often referred to for several other purposes, that if the parson insisted upon it, he could not direct an issue upon a modus, where the evidence did not support it. So, after mature deliberation, Sir *J. Skynner* in the before noticed case in *Scott* v. *Fenwick*,

* 4 Gwil. MS. 1189. † Bunb. 340.

in 1783, refused to direct issues, where the evidence shewed a different modus from that laid. And to try a modus with restriction, where a modus was alleged generally, without any restriction.

No issue can be directed when the evidence shews a different modus from that alleged.

As to the demand of tithe of milk, the defendants, who were liable to that demand, had not proved the modus of two-pence for every *new keld cow*, and three half-pence for every *farrow cow*, which they had alleged by their answers to be payable in lieu and satisfaction of the tithe milk. It was stated by their counsel, that though they had failed in giving satisfactory proof of the modus which they had alleged; and which, it was said, they had alleged through mistake or ignorance of another modus, which actually existed, and had been always paid in the district of *Bellingham*, in lieu of tithes; yet that they had sufficiently proved the existence of the other modus; and they proposed to read the depositions of several witnesses to prove, that a modus of four-pence had been always payable and paid by the occupiers of ancient estates or farms, in that district, in lieu of such tithe arising from such estates or farms. This evidence was objected to on the part of the plaintiff, as being evidence of a modus, which the defendants had not alleged in their answers, and therefore ought not to be received or read on their behalf. The court was of opinion, that the defendants having in their answers insisted on a particular modus, could not be permitted to enter into, and read proof of another, or different modus; and the evidence proposed was not received. In the farther hearing of the cause the plaintiff's counsel thought it expedient, in order to take off the effect of some evidence read for the defendant, to read on the part of the plaintiff (as they were entitled to do) those depositions, which they had objected to, when they were offered to be read on behalf of the defendants. From those depositions it appears, that a payment of four-pence yearly had been immemorially made by the respective occupiers of ancient estates or farms in the district of *Bellingham* to the rector; and there was a great deal of proof from reputation, from tradition, from the frequent declarations of the tithe-gatherer, and from declarations of the last rector, that the four-pence had been paid for the tithe milk. There was no satisfactory proof given on part of the plaintiff to shew, that the 4*d.* had been paid on any the other account. For, as to the deposition of Mr. *Fleming*, the curate, it was far from satisfactory; and it is directly contradicted by the declarations of *Maire*, the tithe gatherer, and of Mr. *Wastell*, the late rector, who expressly admitted, that the payment was not for keeping a book as Mr. *Fleming* supposed, but for the

milk of the cows. And it was remarkable, that Mr. *Wastell's* declaration on that subject was made in the latter part of his time; and that he had been rector of the parish from the year 1723, to the year 1771, when the plaintiff, Doctor *Scott*, succeeded to the rectory.

Under these circumstances, the plaintiff's demand of tithe of milk in kind now stands. The court cannot direct an issue to try the existence of a modus on the behalf of the defendants, which the defendants have not alleged in their answers. The court ought not to decree an account of tithe in kind on the behalf of the plaintiff, in direct contradiction to so much and such strong proof of a modus payable in lieu of the tithe, and that proof arising from evidence read on the plaintiffs part. The bill, therefore, as to such part of it as prayed an account of tithe milk was dismissed.

Court cannot direct an issue to try a modus with a restriction where it is laid without restriction.

As to the demand of tithe of agistment, which was made upon five of the defendants; three of them, namely the defendants, *Charlton*, *Robson*, and *Macdonald*, who occupied ancient tenements or farms in the district of *Bellingham*, insisted on a modus of one penny payable for each of their tenements or farms in lieu of the tithe of grass, whether cut and made into hay, or eaten by barren and unprofitable cattle, as two of the defendants said; or as the other said, eaten by cattle, sheep, or any other living goods. It was in proof, that payments had been continually made for the tithe of agistment of sheep and lambs throughout the whole district, independently on, and without regard to any custom or usage regulating such payments. There could not, therefore, be a modus of one penny, or any modus payable for or in satisfaction of the agistment of *all* barren and unprofitable cattle. If there were *any* modus for agistment, it must have been with some restriction. But the court did not, as was proposed by the defendant's counsel, direct an issue to try a modus with a restriction or exception, where the defendants had insisted on a modus generally, and without any restriction or exception; for that would have been to try a modus different from that, which the defendants had made the ground of their defence. The defendants, who occupied ancient farms in *Bellingham*, were to be decreed to account for their agistment tithes.

As to the modus insisted on by the other two defendants, *Wilkinson* and *Thompson*, to be payable for tithe of hay and agistment of their several inclosed lands in the district of *Simonburn*, which were part of wastes and commons, and which were, on

the inclosure of those wastes and commons, allotted to different farms in *Simonburn*, in satisfaction of the right of common, which the occupiers of those farms enjoyed on the wastes; it was admitted, that payments for tithe of agistment sheep and lambs, without regard to any usage or custom, had been continually made in the district of *Simonburn*, as well as in the district of *Bellingham*; and there was, consequently, the same objection to the modus, as claimed for these new inclosed lands in the district of *Simonburn*, as there was to the like modus claimed for the old inclosures in the district of *Bellingham*.

Court not concluded from directing an issue by a decree in a former cause.

In *Evans and Shaddock* v. *Green* *, 1779, a bill was preferred by the lessees of the vicar of *Fulham*, against a gardener for subtraction of tithes: and for the plaintiffs about 17 witnesses proved full clear and circumstantial fraud in setting out the tithes: and some witnesses for the defendant met these charges by general allegations of fairness; and the court directed an issue. The court is not concluded from directing an issue to try a modus by a decree in a former cause, in which the same modus was insisted upon, but no issue was directed upon it. This is a most important point, and in as much as it appears to have recurred both in principle and circumstances in the case of the parish of *Aldmonbury*, where Mr. *Chester* and the other land holders obtained a decree for establishing moduses against Mr. *Taswell*, in 1759, without an issue having been directed to try them, and afterwards Mr. *Davie*, a succeeding vicar in 1780, demanded tithes in kind, as the present incumbent Mr. *Dods* seems to have done in 1803 or 1804, it will not be irrelevant to state as much of the case of *Collins* v. *Sir H. Gough and others*, as turned upon this point. It was an appeal from the court of chancery to the lords in 1785 †.

Plea of a former decree where the lands covered by it were imperfectly stated, so that the court could not direct an issue, no bar to a bill for moduses.

Sir *H. Gough*, in 1778, preferred his bill in chancery against the Reverend Mr. *Collins*, vicar of *Claverdon*, in *Warwickshire*, and Dr. *John Warren*, the archdeacon of *Worcester*, as rector of *Claverdon*, setting forth, that in the year 1755, Sir *H. Gough* deceased, (the respondent's father) became seized in fee by purchase from *John Parker (inter alia)* of the manor of *Kington*, and a messuage and lands thereunto belonging, called or known by the name of *Kington farm*, situated in the parish of *Claverdon*, (except a very small part of the said farm, which had been exchanged for other lands previously to such purchase,) that the said Sir *Henry Gough*, (the respondent's father,) died in June 1774, leaving the

* 3 Gail. 1190, MS. † 7 Bro. P. C. 34.

respondent his eldest son, and heir at law, who, as such, thereupon became seized in fee of the said farm, (except as aforesaid,) and had ever since been so seized thereof: that the said farm was an ancient farm, and had from time immemorial consisted of the house, and several pieces or parcels of land particularly described in the bill by their names and quantities: that two of the pieces of land (parcel of the said farm) and in the bill also particularly described, had been conveyed by indenture of the 10th of March, 1721, by *John Parker*, (the then owner of the said farm,) to *Andrew Archer*, in exchange for two small pieces of land in the bill, also particularly described, which had ever since the exchange been holden with *Kington* farm: that the proprietors of *Kington farm*, or their farmers thereof, from time immemorial, had been accustomed to pay, and had paid every year on the *Feast-day* of *St. Thomas* to the vicar of *Claverdon*, for the time being, a modus of 13*s.* 4*d.* in lieu of all satisfaction and discharge, and in the name and stead of all the privy and small tithes arising upon the said farm: that no tithes in kind had at any time been paid for the said farm before the year 1773, and then only upon the occasion after mentioned, nor had any ever been demanded for the said farm by any former vicar; that the vicarage of *Claverdon* having become vacant in the year 1768, by the death of *William Cumming*, the last incumbent, the appellant was presented thereto in *October*, 1768 by the Reverend Dr. *John Tottie* (the then archdeacon of *Worcester*;) and that since the appellant had been so presented, he had claimed to be entitled to the tithes of all titheable matters (except corn, grain, and hay,) arising within the said vicarage: that accordingly, in *June* 1773, he had filed his bill in the court of chancery against the said late Sir *Henry Gough*, and against the respondent *Canning*, (his tenant) and several other persons, (which suit after the death of the said late Sir *Henry Gough* was revived against the respondent) praying an account of all titheable matters, (except corn, grain, or hay,) which had been had and taken by the said several defendants since the death of the said *William Cumming*, and that they might be decreed to pay him the value of the tithes of all such titheable matters by them respectively had and taken, and that his right to the said tithes might be established; that the defendants had put in their answers to the said bill; and the said late Sir *Henry Gough* and *William Cunning* had insisted by their answers, that they were not bounden to pay the said tithes, and had alleged, that an ancient immemorial payment or modus of 13*s.* 4*d. per annum* was paid, and payable in lieu of all vica-

rial or small tithes arising from the lands of Sir *Henry Gough* within the parish of *Claverdon*, (except the lands which had been so taken in exchange,) and for *Easter* offerings; and that no former occupier of the said lands had at any time paid any tithes in kind arising from the same: that the appellant having replied to the said answers, issue was joined, and the cause afterwards came on to be heard on the 27th of November, 1777, at the rolls, when Sir *Thomas Sewell*, (master of the rolls,) had been pleased to decree, that the respondent, as personal representative of the late Sir *Henry Gough* and *William Canning*, his tenant, should account with the appellant for the tithes of the said lands since the death of the last incumbent, *William Canning*. The bill then stated the foundation of the decree made by Sir *Thomas Sewell*, at the rolls to be, that the said respondents, Sir *Henry Gough* and *William Canning* had not (and the bill charged that they had not) in the answers of either of them distinguished or ascertained of what pieces of land the said farm called *Kington farm*, consisted, nor set forth with certainty what lands in particular were covered by the said *modus*, of 13*s*. 4*d*. and also that it was by the answer of the said Sir *Henry Gough* alleged, that all the proprietors of the lands of the said Sir *Henry Gough* being within the parish of *Claverdon*, (except the lands before excepted) or their farmers, had paid time out of mind every year to the vicar of *Claverdon* aforesaid, a certain sum of 13*s*. 4*d*. in lieu of all vicarial or small tithes arising upon the said lands, and for *Easter* offerings; but that it was not stated or alleged by the answer either of the said Sir *Henry Gough* or *William Canning*, his tenant, that the said Sir *Henry Gough* had not lands within the parish of *Claverdon*, other than and besides the lands, of which the said farm, called *Kington farm*, consisted, and to which farm only the said modus (as appeared by the proofs taken in the said cause) extended. The bill therefore prayed, that the said modus of 13*s*. 4*d*. might be established, and that the appellant might be decreed to accept the same, the respondent offering by his bill to account with him for the same.

To this bill the appellant, as to the modus of 13*s*. 4*d*. thereby prayed to be established and accepted in discharge of all the privy or small tithes, of, or rising on the said tenement and farm called, *Kington Grange Farm*, with the lands, wood, and appurtenances thereto belonging, and therewith holden in the parish of *Claverdon*, and particularly described in the plaintiff's bill, (except such parts as in the said bill were mentioned to have been exchanged for other lands

previously to Sir *Henry Gough's* purchase,) or which prayed any relief against him, or sought the discoveries in the bill prayed relative thereto, pleaded in bar the bill, answers, proceedings, and decree in the former suit, in which the appellant was plaintiff, and had obtained the decree against Sir *Henry Gough* and *William Canning* for payment of tithes in kind, and averred, that the modus in both suits was for the same lands, and that the decree in the former suit was made upon the full merits of the case, and upon reading the evidence offered on both sides, and that the said decree was duly enrolled, and in full force unreversed and unappealed from. This plea was urged before the chancellor, January 14, 1779, and was overruled; after which the appellant put in his answer; and denied the modus, and claimed a right to tithes in kind; and in support of such claim adduced a variety of evidence.

The defendant, *Dr. Warren*, put in his answer, and disclaimed all right to any other tithes, except of corn and hay, and admitted the appellant's right, as vicar, to all other tithes.

The respondent, Sir *Henry Gough*, did not reply to *Dr. Warren's* answer; but he did reply to the answer of the appellant, but did not examine one new witness, and the cause was set down for hearing on the very same evidence as the former cause *, and order having been made to confirm an agreement between the parties as to the evidence, to be read at all future hearings.

The cause came on to be heard before the chancellor, on the

* That evidence, on part of the appellant, was, the composition real or alluded to in his reasons offered for reversing the decree, and two terriers of 1585, the one relating to the vicarage and signed by the then vicar, the church-wardens, and two other parishioners, the other relating to the parsonage, and signed by the church-wardens, the sidesman, and the parishioners. In the former, which appears to have been only on the vicar's oath, was this entry, viz. "*To the fourth he saith, that the tithes of the "said vicaridg are not leased out, nor to his knowledge, ever were; and there belongeth "to the same vicaridg all manner privy tithes within the parish, corn and hay excepted.*" In the latter there was this entry: "There is belongenge to the same," (meaning the vicaridge) "all the privy tythes of the parishe, all such before-named are received by "the minister for his maintenance." On the part of the respondent were produced receipts by a former vicar in the beginning of this century, for the sum of 13*s.* 4*d.* *ex nomine*, as a modus. There was also the evidence of the administratrix of that same vicar, and of the widow of *Comming*, the late vicar, that this sum of 13*s.* 4*d.* had been paid to and accepted by the vicar as a modus. The purchase deeds from Parker, in 1755, were likewise produced, in which was a covenant from Parker, that the estate was exempt from tithes, and subject to a moiety of 13*s.* 4*d.* in lieu of the great tithes, and to a modus of 13*s.* 4*d.* in lieu of small tithes, and to a modus of 2*s.* 8*d.* in lieu of both great and small tithes of other part of the premises. It seems that this was the first title deed, in which tithes were mentioned.

17th of April, 1780, and it appearing, that a very small part of the farm, for which the modus was payable, had been conveyed in exchange to *Andrew Archer*, as stated in Sir *Henry Gough's* bill, and that the same was then holden by the respondents, the *Archers*; it was ordered, that the cause should stand over, with liberty for the respondent Sir *Henry Gough* to amend his bill as he should be advised, with a view, that the representative of the said *Andrew Archer*, (now respondent,) might be brought before the court.

Sir *Henry Gough* accordingly amended his bill, by adding as parties defendants thereto, the respondents the *Archers*, (who were co-heiresses of the late Lord *Archer*; who was the devisee in fee of the said *Andrew Archer* of that part of the said farm, which had been conveyed to him in exchange as aforesaid,) and *William Oakley*, their tenant thereof, and *William Canning*, the respondent Sir *Henry Gough's* tenant, and *Brownlow*, then Bishop of *Worcester*, the patron of the archdeaconry. The cause came on again to be heard, when the chancellor ordered it to stand for judgment, with liberty for the appellant to apply in the mean time to have his plea re-argued; and the appellant having accordingly applied by petition for that purpose, the same came on together with the cause to be heard for judgment, on the 6th of March, 1782, when the former order, by which the appellant's plea had been overruled, was affirmed, and an issue was directed to try the validity of the modus.

Court not concluded from directing an issue to try a modus in a decree, for an account in a former cause.

From this decree there was an appeal to the house of lords; the appellant insisting, that it was erroneous, and that it ought to have allowed the plea in bar; instead of directing an issue to try the modus, ought to have dismissed the respondent's bill with costs; for the following reasons: as to the plea, because the defence, which was set up by the respondent to the former bill brought by the appellants to establish his right to tithes in kind, was precisely the same as the case made by the respondent's present bill, namely, that the appellant's claim of tithes in kind was barred by a modus of 13*s.* 4*d.* yearly; and there was no substantial variation in the manner, in which it was set out in the one and the other. If that defence had appeared to be in any respect well founded or maintainable, the court, instead of decreeing in the first cause an account and payment of tithes in kind, after a very long and solemn hearing of the merits, (and not for any want of form in setting out the modus, as now suggested by the respondent,) would have dismissed the appellant's bill, or have at

least directed an issue to try the modus at law, which the court might have done (as has been done in many instances,) even supposing the modus not exactly set out in the strict and accurate form of pleading. The plea therefore was proper to prevent the court from proceeding to hear the second cause upon the same subject matter, which had been before solemnly decided, and upon the very same evidence, in favour of the appellant's right to tithes in kind, between the very same parties in the former cause, and was the direct matter in question in that cause: and that decree being enrolled, and in full force, and unappealed from, further proceedings in such a case would not only be vexatious and productive of endless litigation and expence, but of dangerous consequence, and might occasion contradictory and inconsistent decrees, which ought most carefully to be avoided.

The respondent Sir *H. Gough*, in affirmance of the decree, insisted first, that if the decree of the master of the rolls for an account of tithes had been made after an issue directed to try the existence of the modus, and a verdict found against the modus, such a decree might have been conclusive, and might have settled the right in question between the parties, upon the true and real merits of the cause; but, inasmuch as Sir *Thomas Sewell's* decree was merely for an account, in a case where the existence of the modus had never been tried, and the modus itself was imperfectly stated, and the lands obliged to be covered by it were not accurately set forth or described in the answer of Sir *Henry Gough* or his tenant; such a decree for an account ought not to have the effect of binding the right. The plea of a former decree for an account of tithes subtracted, being pleaded in bar, to a bill for establishing a modus, is clearly insufficient, as every plea, which is set upon bar to a plaintiff's demand, must be *ad idem*; and therefore in the present case, it ought to have been shewn by the plea, that the former turned upon the existence or non-existence of the modus, and that this was the *res judicata* in the former suit, in which the decree to account for tithes was made. And the lords affirmed Chancellor *Thurlow's* decree.

No modus decreed against a parson without trial, if he desire it.

In *Webber* v. *Taylor* *, 1727, Lord Chancellor King said, he never would establish a *modus* against a parson, without a trial, if the parson desired it. In *Mawbey* v. *Edmead* †, 1785, a bill was exhibited by the impropriator for tithes; but as his right to the tithes appeared to be a question of title, and that the evidence of

* 2 Eq. Ca. ab. 734, and select ca. ch. 52. † 4 Gwill. 1268.

possession was doubtful, the court observed, that they would not make any decree, till the right have been settled at law, the account being merely consequential to the right; and that the proper tribunal for the trial of right, if the possession were equivocal, and for the construction of deeds, under which parties claimed, was a court of law. They refused to direct an issue, although the plaintiff's counsel strongly pressed for it, in order to have the right tried at law, with the assistance of the court, but ordered the bill to be retained for a year, with liberty for the plaintiff to proceed at law.

In like manner did the court act in *Bousher* v. *Morgan* *, 1794, where to a bill for tithes, some questions of title (namely, as to the effect of a notice and the validity of a lease) were introduced in the defendant's answer; and Lord C. B. *Macdonald* after having stated the case, observed, that the plaintiff insisted, that the notice he had given was either originally good, or that the defect was cured by the defendant's having waived the irregularity. Whether it were so or not, was a pure question at law, and not a proper foundation for a suit in this court. So the question whether the lease itself were void or no, was a question proper to be tried in a court of law. Those were the real questions in the cause, and the account sought was only consequential on the title being established. The court were therefore of opinion that the bill be retained for a year, with liberty for the plaintiff to proceed at law, in the mean time, for the establishment of his title, as he should be advised.

Strew tithes set up in lieu of tithe hay as a modus rejected.

In *Harrington* v. *Horton*, the court of Exchequer had in the first instance decreed an account of hay tithes on a bill by the vicar, which the defendants by their answer denied to be due, and they set up several moduses, or pecuniary compositions in lieu of tithe hay, under the name of strew tithes. The principal defendant Sir *John Smith* in his answer set forth a paper, which he found among his father's writings, relating to the profits of the parsonage, in which was the following article. "Item there is "a duty paid there in lieu of tithe hay, called *strew tithe*, and it "is due upon *Good Friday*, for which there is extant a rental of the "particulars, what is to be paid out of every tenement, and out "of divers particular grounds, which if they that hold them refuse to pay, then they must pay tithe hay; and if it can be all "gathered, it will amount *per annum* to about 3*l.* 14*s.* but it is "now difficult to be gathered."

* 2 Anst. 404.

On the 22nd of June, 1703, the cause came on to be heard, when the court decreed the defendants, the occupiers, to account with and satisfy the plaintiff for the value of their tithe hay, and the arrears; and the usual directions were given for taking such accounts.

From this decree the defendants appealed to the house of lords, contending, that an issue ought first to have been directed, to try, whether tithe hay in kind were, of right, due or payable within the parish. That the respondent's father, for 20 years and upwards, and Sir *Hugh Smith* and his ancestors, for above 100 years before, received tithe corn, and all other tithes in the parish; but forgot, for all that time, to ask for so valuable a part, as the tithe of hay; which if it had been really due, seemed very improbable, and scarce to be credited. And though many debts at law be lost by length of time, and a demand be, in most cases, necessary to preserve the right to a duty; yet, the only foundation of this decree, in equity, was the length of time, without any demand, so that the laches of the respondent's ancestor, which ought to be for the advantage of the appellants, turned out to their manifest prejudice.

On the other side, it was insisted, that tithes in kind were due of common right; and that there was no proof in the cause sufficient to support the *moduses* as laid in the answer; for tithes in kind were proved to be paid for some of the lands, alleged to be covered by these moduses, and as to the other farms, the customary payments were proved to be different from those mentioned in the answer; and some of the lands were destitute even of the pretence of a modus. And, as to the objection, that there ought to have been a trial at law, it was answered, that a court of equity does not send any fact to be tried at law, but where it is rendered doubtful by a contrariety of evidence; but as the appellants had wholly failed in proving their moduses, there was no foundation to send any one of them to such a trial.

But, after hearing counsel in this appeal, it was ordered and adjudged, that the decree complained of should be so far reversed, as, that the several issues should be tried in the proper county, at the next summer assizes; whether the several moduses insisted on by the now appellants, in their answer in the court below, have been time out of mind paid, and payable, for and in lieu of tithe hay in kind; and that the court of Exchequer should proceed upon the issues directed as should be just; and, if any difference

should arise between the parties in settling the issues, it was ordered, that they should apply to Mr. B. *Price*, to settle the issues so to be tried.

Pursuant to this order, the several issues were tried, and a verdict being given for the defendants, the appellants were decreed to account for the arrears of the moduses.

APPENDIX.

No. I.—Page 83.

DIE VENERIS, NOVEMBER 8, 1644.

An Ordinance of the Lords and Commons assembled in Parliament, for the true payment of Tithes and other such Duties, according to the Laws and Customs of this Realme.

WHEREAS divers persons within the realme of England and dominion of Wales, taking advantage of the present distractions, and ayming at their owne profit, have refused, and still do refuse to set out, yield, and pay tithes, offerings, oblations, obventions, and other such duties, according to the law of the said realme, to which they are the more incouraged, both because there is not now any such compulsory means for recovery of them by any ecclesiasticall proceedings as heretofore hath beene; and also for that by reason of the present troubles, there cannot be had speedy remedy for them in the temporall courts, although they remain still due, and of right payable, as in former times. Be it therefore declared and ordained, by the lords and commons in parliament assembled, *that every person and persons whatsoever within the said realme and dominion shall fully, truly, and effectually set out, yield, and pay respectively all and singular tythes, offerings, oblations, obventions, rates for tythes,* and all other duties commonly knowne by the name of tythes, and all arrears of them respectively, to all and every the respective proprietors, impropriators, owners, and possessors, as well lay as ecclesiasticall respectively, their executors and administrators *of parsonages, vicarages, or rectories, either impropriate or presentative, or donative, and of vicarages, and of portions of tythes respectively within the said realme and dominion, according to the law, custome, prescription, composition or contract respectively, by which they or any of them ought to have been set up, yielded, and paid at the beginning of this present parliament, or two years before,* and in all and every case where any person or persons hath at any time since the beginning of this present parliament or two years before, subtracted, withdrawne, or failed in due payment of, or hereafter at any time shall subtract, withdraw, or fail in due payment of any such tythes, offerings, oblations, obventions, rates for tythes, or any duty known by the name of tythes, or arrears of them or any of them, as aforesaid, the person or persons to whom the same is, hath beene, or shall be respectively due, his executors or administrators, shall, and may make his and their complaints thereof *to any two justices of peace* within the same county, city, towne, place, riding, or division, not being patron or patrons of the church where such substraction, withdrawing, or failer of payment hath been or shall be; not being interested any way in the things in question: which justices of peace are *authorized hereby, and shall have full power to summon by reasonable warning beforehand, all and every such person or persons against whom any such complaints shall be made to them,* and after his or their appearance before them, or upon *default made after the second summonds,* the said summonds being made as aforesaid, *and proved before the said justices by oath, which said justices hereby shall have power to administer the same, to hear and determine the said*

complaint, by sending for, and examining witnesses upon oath, which said oath the said justices are hereby also authorized to minister, *and admitting other proofs brought on either side, and thereupon* shall in writing under their hands and seals adjudge the case, and give reasonable costs and damage to either party, as in their judgments they shall think fit.

And be it further ordained by the authoritie aforesaid, that if any person or persons *shall refuse to pay any such tithes or sums* of money as upon such complaint, and proceeding shall be by any such justices of peace adjudged as aforesaid: and shall not *within thirty days next after notice of such judgment* in writing under the hand and seal of such justices of peace given to him or them, make full satisfaction thereof, according to the said judgment, in every such case the person and persons respectively to whom any such tithes or sums of money shall be upon such judgment due, shall, and may by warrant from the said justices, or either of them, *distrain all and every, or any the goods and chattels of the party or parties so refusing,* and of the same to make sale, and to retain to himself, or themselves so much of the monies raised by sale thereof, as may satisfie the said judgment, returning the overplus thereof to the party or parties so refusing. And in case no sufficient distresse can be found, that then the said justices of peace, or any other justices of peace of the same county, as aforesaid, shall, and may commit all and every such person and persons so refusing to the next common goale *of the said county, there to remain in safe custody without baile or mainprize,* until he or they respectively shall make full satisfaction, according to the said judgment.

Provided always, and it is further ordained by the authority aforesaid, that if any person or persons shall thinke him or themselves unjustly dealt with by or in any such judgment, as aforesaid, then he or they respectively shall and may thereof complaine to the high court of chancery, where the cause between the parties shall be againe heard and determined, which court shall hereby have full power and authority to summon the parties, and to hear and determine the same, and to suspend execution as the same court shall see cause, and to give final judgment therein with reasonable costs to the party or parties grieved by any such complaint brought before them.

Provided always that this ordinance or any thing therein contained, shall not extend to any tithes, offerings, yearly payment, or other ecclesiasticall duties, due or to be due for any houses, buildings, or other hereditaments within the city of London or the liberties thereof, which be otherwise provided for by act of parliament.

JOHN BROWNE, Cler. Parliamentorum.

DIE LUNÆ, 9 AUGUST, 1647.

An Additional Ordinance of the Lords and Commons assembled in Parliament, for the true payment of Tithes and other Duties.

Whereas some doubts have been raised, whether ministers put into livings and sequestrations by ordinance of both houses of parliament, or committees thereunto authorized by them, be comprized within the ordinance of the eighth of November, 1644. Entitled, an ordinance of the lords and commons assembled in parliament for the true payment of tithes, and other such duties according to the law, and custome of the realme, so as to recover their tithes and other duties by virtue thereof, and in what manner justices of peace ought to proceed upon the same. The lords and commons assembled in parliament, for the prevention of all such doubts and scruples do declare, that every minister put, or which shall be put

into any parsonage, rectory, vicarage, or ecclesiasticall living, by way of sequestration, or otherwise, by both or either the houses of parliament, or by any committee, or other person or persons by authority of any ordinance or order of parliament, shall, and may sue for the recovery of his tithes, rates for tithes, rents, or other duties by virtue of the said ordinance, in as full and ample manner to all intents and purposes, as any other minister, or other person whatsoever. And that the justices of peace mentioned in the said ordinance, shall upon complaint to them made by such minister as aforesaid, or other person within the said ordinance, immediately without delay, issue out their warrants to the constables, petty constables, or other officers to summon such person or persons who already have, or hereafter shall refuse to set out, or pay, or shall subtract their tithes, rates for tithes, rents, or other duties, to appear before them at their next monthly meeting, or sooner; and use all possible expedition in the hearing and determining of such complaints; *and shall likewise have power to award treble damages to the parties complaining, and shall award the same accordingly in all such cases where the statute allows and gives the same to any minister or other person whatsoever.*

And in case the summe or sums of money so adjudged and awarded, shall not be paid within the time in the said ordinance mentioned, then the said justices shall upon complaint to them made, send forth their warrants to the constables, petty constables, or such other fit persons, as shall be by the parties named, to whom any such sum or summes upon such judgment shall be due, and distrain all and every, or any the goods and chattels of any person or persons so refusing; and to sell and dispose of the said goods and chattels according to the said ordinance; and to impose such fines and penalties, not exceeding the sum of forty shillings upon the constable, petty constables, and other officers, who shall wilfully refuse or be negligent in executing their warrants, as they in their discretion shall thinke meet.

And because many appeals are brought into the chancery upon former ordinance for tithes, rather for vexation and delay, than otherwise; be it therefore ordained, that no appeal shall be received or admitted thereupon, until the party appealing shall lay downe in money, either with the said justices of peace, or in the court of chancery, the full value of the tithes adjudged before the said justices, by way of securitie, to persecute his appeal with effect, and to render double costs and damages to the party injured or delayed by the appeal, in case no reliefe be given upon the appeal to the persecutor.

Provided that this ordinance shall continue and be in full force, from the four and twentieth day of July, 1647, until the first day of November, which shall be in the year 1648.

JOHN BROWNE, Cler. Parliamentorum.

DIE LUNÆ, AUGUST 23, 1647.

An Ordinance for keeping in Godly Ministers placed in Livings by Authority of Parliament.

Whereas divers ministers in the several counties of this kingdome, for notorious scandals and delinquency, have been put out of their livings by authority of parliament, and godly, learned, and orthodox ministers placed in their rooms; and whereas the said scandalous and delinquent ministers by force, or otherwise, have entered upon churches, and gained the possession of the parsonage houses, tithes, and profits thereunto belonging, and have obstructed the payment of tithes, and other profits due by the pa-

rishioners, unto the ministers placed in the said churches by authority aforesaid.

The lords and commons assembled in parliament, doe therefore order and ordaine, and be it ordained by the said lords and commons, that sheriffs, mayors, bayliffs, justices of the peace, all deputy-lieutenants, and committees of parliament in the several counties, cities, and places within this kingdome, do forthwith apprehend, or cause to be apprehended, all such ministers as by authority of parliament have beene put out of any church or chapell within this kingdome, or any other person or persons who have entered upon any such church or chapell, or gained the possession of such parsonage houses, tithes, and profits thereunto belonging, or have obstructed the payment of the tithes, and other profits due by the parishioners, to the said ministers there placed by authority of parliament, or sequestrators appointed, were no ministers are settled to receive the same, and all such persons as have been aiders, abettors, or assistors in the premises, and commit them to prison, there to remaine untill satisfaction be made to the several ministers placed by the said authoritie of parliament for his or their damages sustained, as to the said sheriffs, mayors, bayliffs, justices of the peace, deputy-lieutenants, or committees of parliament, or any two of them shall appear to be just, upon hearing and proofe made upon the oath of two sufficient witnesses (which they or any two of them are hereby authorized to administer,) who are likewise required to restore, settle, and quiet the possession in such ministers as have beene placed by the said authority of parliament, and they or any two of them have hereby power to raise trained bands, or any other forces within the said several counties, cities, and places to put this ordinance in execution, and the said sheriffs, mayors, bayliffs, justices of the peace, deputy-lieutenants, and committees of parliament respectively, are hereby required to take effectual course according to the several orders and ordinances of parliament in that behalf made, that all men do pay their tithes and profits due unto the said respective minister. And it is hereby further ordered and ordained, that the committee appointed for the plundered ministers, have power to see this ordinance put in execution. And it is further ordained, that the committee of complaints do give the like remedie to all such ministers put in by the said authoritie of parliament, and sequestrators of the profits against whom any action shall be brought by any such delinquent, or scandalous ministers, or any other claiming by or under them for their livings, tithes, and profits, as they are authorized unto by any order or ordinance in other cases, it is lastly ordered and ordained, that if any such scandalous or delinquent minister, put out as aforesaid, their aiders, or abettors, shall at any time hereafter, disturbe, molest, or hinder such minister as is put into such church or chappell as aforesaid, in the exercising of the office of his ministry, upon proofe thereof made upon the oath of two witnesses, before the said sheriffs, mayors, bayliffs, justices of the peace, deputy-lieutenants, or committees of parliament, or any other two of them; it shall and may be lawfull to, and for the said sheriffs, mayors, bayliffs, justices of peace, deputy-lieutenants, or committees of parliament, or any two of them, to commit such offender or offenders to prison for one month, so often as he or they shall so offend.

JOHN BROWNE, Cler. Parliamentorum.

DIE MARTIS, APRIL 4, 1648.

An Ordinance of the Lords and Commons assembled in Parliament, for the better payment of Tithes and Duties, to the Ministers of the City of London.

Whereas an ordinance of parliament of the eighth of November, A. D. 1644, entitled, an ordinance of the lords and commons assembled in parliament, for the true payment of tithes, and other such duties, according to the laws and customs of the realme, there is a proviso, that the said ordinance, or any thing therein contained, shall not extend to any tithes offerings, and yearly payments, or other ecclesiasticall duties, due or to be due for any houses, buildings, or other hereditaments within the city of London, or the liberties thereof which be otherwise provided for by act of parliament: and whereas some doubt and scruple hath been made, whether the lord mayor of the city of London be sufficiently authorized to relieve such ministers within the said cities or the liberties thereof, as have been put into any benefice or ecclesiasticall living, by way of sequestration by both or either houses of parliament, or by the committee of plundered ministers, or any other committee of parliament; be it therefore ordered and ordained by the lords and commons in this present parliament assembled, that the said proviso in the before-mentioned ordinance of the eighth of November, 1644, be hereby repealed and wholly made null and void, and that the said ordinance of the eighth of November, 1644, and the ordinance of the ninth of August, 1647, entitled, an additionall ordinance of the lords and commons assembled in parliament, for the true payment of tithes and other duties, and the ordinance of the 23rd of August, 1647, entitled, an ordinance for the keeping of godly ministers placed in livings by authority of parliament, and all other ordinances of parliament concerning the payment of tithes, rates for tithes, rents, or other duties, do extend to the said city of London, and the liberties thereof, and be put in execution by the lord mayor of the said city for the time being, or by any two justices of peace within the said citie or liberties thereof, who are hereby authorized and required respectively, to require and command the aid of all constables and other officers, that shall be by the said mayor or justices of peace as aforesaid, appointed for their assistance in the due execution of this ordinance, as well within their severall parishes or precincts as without, as well in cases of sequestrations as otherwise, to all intents and purposes, and in the like manner as in and by the said ordinances is ordained, limited, and appointed to be executed and done, in any other place or places within the kingdome of England, by the respective justices of peace and other officers in the said ordinances mentioned.

Provided, that this ordinance, or any thing therein contained, shall not be construed to extend to the payment of any other kind of tithes, payments, rents, or duties, than such as have been paid at any time since the beginning of this parliament, or two years before.

JOHN BROWNE, Cler. Parliamentorum.

DIE VENERIS, OCTOBER 27, 1648.

An Ordinance of the Lords and Commons assembled in Parliament, for the true payment of Tithes and other Duties, and for continuance of an ordinance of the 9th of August, 1647.

The lords and commons assembled in parliament, doe order, ordaine, and declare, that the ordinance of parliament of the 9th of August, A. D.

1647, intituled, an additional ordinance of the lords and commons assembled in parliament, for the true payment of tithes and other duties, shall continue, remaine, and be, and hereby is continued to remaine and be in full force and strength, from the last day of October, A. D. 1648, untill the first day of November, A. D. 1650, any *promise* of limitation, or restraint for ceasing, or determination thereof therein contained, or to be contrary in any wise notwithstanding. Provided always, that upon all appeals to be brought into the chancery, that the party appealing shall lay downe in moneys either with the justices of peace, by whom any order shall be made according to the purport of the said ordinance, or in the court of chancery, the full value of the tithes adjudged before the said justices, together with the treble damages and costs, the which costs so to be deposited shall not exceed ten pounds, or in default thereof no appeals shall be received or admitted; and it is likewise ordained, That the penalty of forty shillings upon constables, petty constables, and other officers limited and appointed in and by the said ordinance for neglecting to doe their duties, shall be levied by way of distresse and sale of the goods of such persons so neglecting or refusing, by warrant from the said justices of peace, and by such persons as shall by them be thereunto authorized, the same to be employed to the use of the poor of that parish, where such constable, petty constable, or other officers dothe inhabite.

JOHN BROWNE, Cler. Parliamentorum.

29th April, 1652. Resolved upon the question by the parliament, That it be referred to the committee appointed to receive proposals for the better propagation of the gospel, to take into speedy consideration, how a competent and convenient maintenance for a godly and able ministry may be settled in lieu of tithes, and present their opinion therein to the house, and *that tithes shall be paid as formerly, untill such maintenance be settled.*

No. II.—P. 85, *et alibi.*

STATUTES OF MORTMAIN.

9 Hen. III. stat. 1. c. 31. A. D. 1225.

No Land shall be given in Mortmain.

It shall not be lawful from henceforth to any to give his lands to any religious house, and to take the same land again to hold of the same house. Nor shall it be lawful to any house of religion to take the lands of any, and to lease the same to him of whom he received it. If any from henceforth give his lands to any religious house, and thereupon be convict, the gift shall be utterly void, and the land shall accrue to the lord of the fee.

Who shall take the Forfeiture of Lands given in Mortmain.

Where of late it was provided, that religious men should not enter into the fees of any without licence and will of the chief lord, of whom such fees be holden immediately; and notwithstanding such religious men have entered as well into their own fees as into the fees of other men appropriating and buying them, and sometimes receiving them of the gift of others, whereby the services that are due of such fees, and which at the beginning were provided for defence of the realm are wrongfully withdrawn, and the chief lords do leese their escheetes of the same. We therefore to the profit of our realm, intending to provide convenient remedy, by the advice of our prelates, earls, barons, and other our subjects, being of our council, have

provided, made and ordained, That no person, religious or other whatsoever he be, that will buy or sell any lands or tenements, or under the colour of gift or lease, or that will receive by reason of any other title, whatsoever it be, lands or tenements, or by any other craft or engine will presume to appropre to himself, under pain of forfeiture of the same, whereby such lands or tenements may any wise come into mortmain. We have provided also, that if any person, religious or other, do presume either by craft or engine to offend against this statute, it shall be lawful to us, and other chief lords of the fee immediate, to enter into the lands so aliened, within a year from the time of alienation, and to hold it in fee as an inheritance. And if the chief lord immediate be negligent, and will not enter into such fee within the year, then it shall be lawful to the next chief lord immediate of the same fee to enter into the same land within half a year next following, and to hold it as before is said; and so every lord immediate may enter into such land, if the next lord be negligent in entering into the same fee as is aforesaid. And if all the chief lords of such fees, being of full age, within the four seas, and out of prison, be negligent or slack in this behalf for one whole year, we, immediately after the year accomplished, from the time that such purchases, gifts or appropriations hap to be made, shall take such lands and tenements into our hand, and shall infeoff other therein by certain services to be done to us for the defence of our realm; saving to the chief lords of the same fees their wards and eschetes, and other services thereunto due and accustomed: And therefore we command you, that ye cause the foresaid statute to be read before you, and from henceforth to be kept firmly and observed. Witness myself at Westminster the 15th day of Nov. the 7th year of our reign*.

No. III.—P. 106.

The Form of a Grant of an Appropriation.

Sciatis quod nos dedimus, &c. Decano et capitulo ecclesiæ cathedralis, &c. Advocation' rectoriæ ecclesiæ parochialis, de, &c. Habend. et tenend. &c. iisdem decano et capitulo, &c. successoribus suis in perpetuum. Et ulterius sciatis per præsentes quod nos de gratiâ nostrâ speciali ac authoritate nostr. regiâ supremâ et ecclesiasticâ, qua nunc fungimur, pro nobis, hæredibus et successoribus nostris concedimus et licentiam damus prædict. Decano et capitulo et successoribus suis rectoriam et ecclesiam prædict. quando per mortem, resignationem, vel deprivationem, aut per aliquem aliam modum quemcunque vacare contigerit, immediate in suos proprios usus tenere sibi et successoribus suis in perpetuum possent et valeant absque molestatione et impedimento nostro, Hæredum aut successorum nostrorum, ac hoc absque aliquâ præsentationem, inductione, sive admissione alicujus incumbentis ad eandem rectoriam ex tunc in posterum fiend' ac ulterius.

An appropriation by the patron, or first founder, is thus: Ego A. B. de,

* This statute was enforced and amended by 13 Ed. I. stat. 1. c. 32. 18 Ed. I. stat. 1. c. 3. 34 Ed. I. stat. 3. See 18 Edw. III. stat. 3. c 3. with respect to licences for purchases in mortmain: and 15 R. II. c. 5. what purchases shall be adjudged mortmain. 23 H. VIII. c. 10. for giving lands to pious uses for 20 years. See 22 Car. II. c. 6. enabling corporations to purchase in mortmain; 7 and 8 Wm. III. 37. empowering the king to grant licences to alien in mortmain; and 9 Geo. II. c. 36. restraining gifts in mortmain by will.

&c. concessi ecclesiam et advocationem meam de H. cum terris et decimis omnibus ad eam pertinentibus, decano de, &c.

No. IV.—P. 124.

11 and 12 Wm. III. c. 16. s. 1.

An Act for the better ascertaining the Tithes of Hemp and Flax.

'Whereas an act made in the third year of the reign of his majesty and 'the late queen, intitled, *An Act for the better ascertaining the Tithes of 'Hemp and Flax*, was made to continue but for seven years, and to the end of 'the next sessions of parliament after such term ended, and is now expired:' And whereas the said act hath by experience been found very useful and necessary: Be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That from and after the five and twentieth day of March, which shall be in the year of our Lord one thousand seven hundred, all and every person or persons who shall sow or cause to be sown any hemp or flax, in any parish or place in the kingdom of England, dominion of Wales, and town of Berwick-upon-Tweed, shall pay or cause to be paid to every parson, vicar, or impropriator of any such parish or place, yearly and every year, the sum of five shillings, and no more, for each acre of hemp and flax so sown, before the same be carried off the ground, and so proportionably for more or less ground so sown; for the recovery of which sum or sums of money, the parson, vicar, or impropriator, shall have the common and usual remedy allowed of by the laws of the land.

II. Provided, That this act, or any thing therein contained, shall not extend to charge any lands discharged by any *modus decimandi*, ancient composition, or otherwise discharged of tithes by law.

III. Provided always, That nothing herein contained shall extend, or be construed to extend to make any alteration in the right or manner of payment of tithes of flax and hemp to any ecclesiastical person, incumbent of any parsonage, vicarage, or curacy, or to any impropriator or body corporate, having or holding any impropriation, for such ground as hath at any time since the second day of February one thousand six hundred and eighty-four, and before the second day of February one thousand six hundred and ninety-one, been sown with flax or hemp, and paid tithe in kind to such incumbent, impropriator, or body corporate respectively, but that the same shall continue and be payable and paid, as fully and in such manner as formerly; any thing in this act to the contrary notwithstanding.

IV. Provided, That this law shall continue in force for seven years, to be accounted from the said five and twentieth day of March, and from thence to the end of the next session of parliament, and no longer.

No. V.—P. 126.

31 Geo. II. c. 12. A. D. 1758.

An Act to encourage the Growth and Cultivation of Madder in that part of Great Britain called England, by ascertaining the Tithe thereof there.

'Whereas madder is an ingredient essentially necessary in dyeing 'and callicoe printing, and of great consequence to the trade and manufac-'tures of this kingdom; and may be raised therein equal in goodness, if not

'superior, to any foreign madder: And whereas the encouraging of the 'growth thereof in this kingdom will be a saving of a very large sum of 'money, which is now paid for that commodity, imported duty free from 'abroad; and will also be a means of employing great numbers of poor in 'the winter months: And whereas the ascertaining of the tithe of madder 'will be the greatest means of encouraging the growth of that commodity in 'this kingdom:' May it therefore please your majesty, that it may be enacted: and be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the first day of August, which will be in the year of our Lord one thousand seven hundred and fifty-eight, all and every person and persons who shall plant, grow, raise or cultivate, or cause to be planted, grown, raised, or cultivated, any madder in any parish or place within that part of Great Britain called England, shall pay or cause to be paid, to every parson, vicar, curate, or impropriator of any such parish or place, the sum of five shillings, and no more, yearly and every year, for each acre of madder so planted, grown, raised or cultivated, and so proportionably for more or less ground so planted or cultivated, in lieu of all manner of tithe of madder; for the recovery of which sum or sums of money, the parson, vicar, or impropriator, shall have the common and usual remedy allowed of by the laws of the realm.

II. Provided also, and be it enacted by the authority aforesaid, That no madder shall be carried off the ground on which it grows, before the sum or sums herein before directed to be taken in lieu of tithes, be paid to the person or persons respectively entitled to receive the same.

III. Provided also, That this act, or any thing herein contained, shall not extend to charge any lands discharged by any *modus decimandi*, ancient composition, or other discharge of tithes by law.

IV. Provided always, and be it enacted by the authority aforesaid, That this act shall continue and be in force for the space of fourteen years, and from thence to the end of the then next session of parliament, and no longer.

5 Geo. III. c. 18. A. D. 1765.

An Act for continuing an Act, made in the thirty-first Year of his late Majesty's Reign, for encouraging the Growth and Cultivation of Madder in that part of Great Britain called England, by ascertaining the Tithe thereof.

'Whereas an act made in the thirty-first year of his late majesty 'King George the Second, intituled, *An Act to encourage the Growth and 'Cultivation of Madder in that part of Great Britain called England, by 'ascertaining the Tithe thereof*, was to continue in force from the first day 'of August, one thousand seven hundred and fifty-eight, for the space of 'fourteen years, and from thence to the end of the next session of parliament: And whereas the cultivation of madder, from the setting to its 'being fit for use, requires so long a time, and the buildings, mills, and 'other requisites necessary to be provided and maintained for manufacturing 'it, are so expensive, that many people may be unwilling to begin the culture of it during the subsisting term of the said act: And whereas the price 'of foreign madder is of late greatly raised, and the same does not come 'into the consumers hands so good as it may be manufactured here:' Be it therefore enacted by the king's most excellent majesty, by and with the

advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That the said act shall be, and the same is hereby declared to be, further continued from the expiration thereof, for and during the further term of fourteen years, and to the end of the next session of parliament.

No. VI.—P. 135.

2 and 3 Edw. VI. c. 13. A. D. 1548.

An Act for Payment of Tithes.

Sect. 1. Whereas in the parliament holden at *Westminster*, the fourth day of February, in the twenty-seventh year of the reign of the late king, of most famous memory, King Henry the Eighth, there was an act made concerning payment of tithes predial and personal. And also in another parliament holden at *Westminster*, the twenty-fourth day of July, in the thirty-second year of the reign of the said late King Henry the Eighth, another act was made concerning true payment of tithes and offerings, in which several acts many and divers things be omitted and left out, which were convenient and very necessary to be added to the same. In consideration whereof, and to the intent the said tithes may be hereafter truly paid, according to the mind of the makers of the said act: be it ordained and enacted, by the king our sovereign lord, with the assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, that not only the said acts made in the said twenty-seventh and thirty-second years of the reign of the said late King Henry the Eighth, concerning the true payment of tithes, and every article and branch therein contained, shall abide and stand in their full strength and virtue: but also be it further enacted by the authority of this present parliament, that every of the king's subjects shall from henceforth truly and justly, and without fraud or guile, divide, set out, yield and pay all manner of their predial tithes, in their proper kind, as they rise and happen, in such manner and form as hath been of right yielded and paid, within forty years next before the making of this act, or of right or custom ought to have been paid. And that no person shall from henceforth take or carry away any such or like tithes, which have been yielded or paid within the said forty years, or of right ought to have been paid, in the place or places titheable of the same, before he hath justly divided or set forth, for the tithe thereof, the tenth part of the same, or otherwise agreed for the same tithes with the parson, vicar, or other owner, proprietor, or fermor of the same tithes, under the pain of forfeiture of treble value of the tithes so taken or carried away.

Sect. 2. And be it also enacted by the authority aforesaid, that all times whensoever, and as often as the said predial tithes shall be due, and at the tithing time of the same, it be lawful to every party to whom any of the said tithes ought to be paid, or his deputy or servant, to view and see their said tithes to be justly and truly set forth and severed from the nine parts, and the same quietly to take and carry away. And if any person carry away his corn or hay, or his other predial tithes, before the tithe thereof be set forth, or willingly withdraw his tithes of the same, or of such other things whereof predial tithes ought to be paid; or to stop or let the parson, vicar, proprietor, owner, or other their deputies, or farmers, to view, take, and carry away their tithes, as is above said, by reason whereof the said tithe or tenth is lost, impaired, or hurt; that then upon due proof thereof made before the spiritual judge, or any other judge, to whom heretofore be

might have made complaint, the party so carrying away, withdrawing, letting, or stopping, shall pay the double value of the tenth or tithe so taken, lost, withdrawn, or carried away, over and besides the costs, charges, and expences of the suit in the same: the same to be recovered before the ecclesiastical judge, according to the king's ecclesiastical laws.

Sect. 3. And be it further enacted by the authority aforesaid, that all and every person which hath, or shall have any beasts, or other cattle titheable, going, feeding, or depasturing in any waste or common ground, whereof the parish is not certainly known, shall pay their tithe for the increase of the said cattle so going in the said waste or common, to the parson, vicar, proprietor, portionary, owner, or other their farmers, or deputies of the parish, hamlet, town, or other place, where the owner of the said cattle inhabiteth or dwelleth.

Sect. 4. "Provided always, and be it enacted by the authority aforesaid, that no person shall be sued, or otherwise compelled to yield, give, or pay any manner of tithes, for any manors, lands, tenements or hereditaments, which by the laws and statutes of this realm, or by any privilege or prescription, are not chargeable with the payment of any such tithes, or that be discharged by any composition real.

32 Hen. VIII. c. 7. s. 5.

Sect. 5. "Provided always, and be it enacted by the authority aforesaid, that all such barren heath or waste ground, other than such as be discharged for the payment of tithes by act of parliament, which before this time have lain barren, and paid no tithes, by reason of the same barrenness, and now be, or hereafter shall be improved and converted into arable ground or meadow, shall from henceforth, after the end and term of seven years next after such improvement fully ended and determined, pay tithe for the corn and hay growing upon the same, any thing in this act to the contrary in any wise notwithstanding.

Sect. 6. "Provided always, and be it enacted by the authority aforesaid, that if any such barren waste, or heath ground, hath before this time been charged with the payment of any tithes, and that the same be hereafter improved or converted into arable ground or meadow, that then the owner or owners thereof shall during the seven years next following, from and after the same improvement, pay such kind of tithe as was paid for the same before the said improvement, any thing in this act to the contrary in any wise notwithstanding.

Sect. 7. "And be it also further enacted by the authority aforesaid, that every person exercising merchandizes, bargaining and selling, clothing, handicraft, or other art or faculty, being such kind of persons, and in such places as heretofore within these forty years have accustomably used to pay such personal tithes, or of right ought to pay, (other than such as have been common day-labourers,) shall yearly, at or before the feast of Easter, pay for his personal tithes, the tenth part of his clear gains, his charges and expences, according to his estate, condition, or degree, to be therein abated, allowed, and deducted.

Sect. 8. "Provided always, and be it enacted, that in all such places where handicrafts-men have used to pay their tithes, within these forty years, the same custom of payment of tithes to be observed and to continue, any thing in this act to the contrary notwithstanding.

Sect. 9. "And be it also enacted by the authority aforesaid, that if any person refuse to pay his personal tithes in form aforesaid, that then it shall be lawful to the ordinary of the same diocess where the party that so ought

to pay the said tithes is dwelling, to call the same party before him, and by his discretion to examine him by all lawful and reasonable means, other than by the party's own corporal oath, concerning the true payment of the said personal tithes.

Sect. 10. "Provided always, and be it enacted by the authority aforesaid, that all and every person and persons, which, by the laws or customs of this realm ought to make or pay their offerings, shall yearly, from hence forth, well and truly content and pay his or their offerings to the parson, vicar, proprietor, or their deputies or farmers, of the parish or parishes where it shall fortune or happen him or them to dwell or abide: and that at such four offering days, as at any time heretofore within the space of four years last past, hath been used and accustomed for the payment of the same; and in default thereof to pay for their said offerings at Easter, then next following.

Sect. 11. "Provided also, and be it enacted by the authority aforesaid, that this act, or any thing therein contained, shall not extend to any parish which stands upon and towards the sea coasts, the commodities and occupying whereof consisteth chiefly in fishing, and have by reason thereof used to satisfy their tithes by fish: but that all and every such parish and parishes, shall hereafter pay their tithes according to the laudable customs, as they have heretofore of ancient time, within these forty years, used and accustomed, and shall pay their offerings as is aforesaid.

Sect. 12. "Provided always, and be it enacted by the authority aforesaid, that this act, or any thing therein contained, shall not extend in any wise to the inhabitants of the cities of London and Canterbury, and the suburbs of the same, nor to any other town or place that hath used to pay their tithes by their houses, otherwise than they ought or should have done before the making of this act: any thing contained in this act to the contrary in any wise notwithstanding.

Sect. 13. "And be it further enacted by the authority aforesaid, that if any person do subtract or withdraw any manner of tithes, obventions, profits, commodities, or other duties before mentioned, or any part of them, contrary to the true meaning of this act, or of any other act heretofore made, that then the party so substracting or withdrawing the same, may or shall be convented and sued in the king's ecclesiastical court, by the party from whom the same shall be substracted or withdrawn, to the intent the king's judge ecclesiastical shall and may, then and there, hear and determine in same according to the king's ecclesiastical laws. And that it shall not be lawful unto the parson, vicar, proprietor, owner, or other their farmers or deputies, contrary to this act, to convent or sue such withholder of tithes, obventions, and other duties aforesaid, before any other judge than ecclesiastical. And if any archbishop, bishop, chancellor, or other judge ecclesiastical, give any sentence in the foresaid causes of tithes, obventions, profits, emoluments, and other duties aforesaid, or in any of them, (and no appeal nor prohibition hanging,) and the party condemned do not obey the said sentence, that then it shall be lawful to every such judge ecclesiastical, to excommunicate the said party, so as afore condemned and disobeying, in the which sentence of excommunication, if the said party excommunicate, wilfully stand and endure still excommunicate, by the space of forty days next after, upon denunciation and publication thereof in the parish church, or the place or parish where the party so excommunicated is dwelling, or most abiding, the said judge ecclesiastical may then at his pleasure signify to the king in his court of chancery, of the state and condition of the said party so excommunicate; and thereupon to require process *de excommuni-*

ello, to be awarded against every such person, as hath been so excommunicate.

Sect. 14. "Be it further enacted by the authority aforesaid, that if any party at any time hereafter, for any matter or cause before rehearsed, limited, or appointed by this act, to be sued or determined in the king's ecclesiastical court, or before the ecclesiastical judge, do sue for any prohibition in any of the king's courts, where prohibitions before this time have been used to be granted, that then in every such case, the same party, before any prohibition shall be granted to him or them, shall bring and deliver to the hands of some of the justices, or judges of the same court where such party demandeth the prohibition, the very true copy of the libel depending in the ecclesiastical court, concerning the matter wherefore the party demandeth the prohibition, subscribed or marked with the hand of the same party, and under the copy of the said libel shall be written the suggestion, wherefore the party so demandeth the said prohibition: and in case the said suggestion, by two honest and sufficient witnesses at the least, be not proved true in the court where the said prohibition shall be so granted, within six months next following after the said prohibition shall be so granted and awarded, that then the party that is letted or hindered of his or their suit in the ecclesiastical court, by such prohibition, shall upon his or their request and suit, without delay, have a consultation granted in the same case, in the court where the said prohibition was granted, and shall also recover double costs and damages against the party that so pursued the said prohibition, the said costs and damages to be assigned or assessed by the court where the said consultation shall be so granted, for which costs and damages, the party to whom they shall be awarded may have an action of debt, by bill, plaint, or information in any of the king's courts of record, wherein the defendant shall not wage his or their law, nor have any essoin or protection allowed or admitted.

Sect. 15. "Provided always, and be it enacted by the authority aforesaid, that this act, or any thing therein contained, shall not extend to give any minister or judge ecclesiastical, any jurisdiction to hold plea of any matter, cause or thing; being contrary or repugnant to or against the effect, intent, or meaning of the statute of *Westminster* second, the fifth chapter, the statute of *articuli cleri*, *circumspecte agatis*, *silva cædua*, the treatise *de regia prohibitione*, nor against the statute of *anno primo Edwardi Tertii*, the tenth chapter, or any of them, nor yet hold plea in any matter whereof the king's court of right ought to have jurisdiction; any thing therein contained to the contrary in any wise notwithstanding.

Sect. 16. "Provided nevertheless, where heretofore such custom hath been in many parts of Wales, that of such chattel and other goods, as hath been given with the marriage of any person, their tithes have been exacted and levied by the parsons or curates in those parts: which custom being dissonant from any part of this realm, as it seemed when the said country of Wales was through civil dissensions uncultivated, for want of other sufficient profits that might otherwise grow to the curates and ministers there, to have been for that time tolerable: so now the country being well manured and husbanded, and the tithe is duly paid there of corn, hay, wool, and cheese, and of other increase of all manner of cattle, as it is commonly in all other parts of this realm, the same custom seems to be grievous and unreasonable, specially where the benefices are else sufficient for the finding of the said ministers and curates; that it be therefore enacted by the authority aforesaid, that from and after the first day of May next coming, no such tithes of marriage goods be exacted or required of any person within the said dominion of *Wales*, or marches of the same: any thing in

this act contained, or any other act, custom, prescription, had or made to the contrary hereof notwithstanding. Co. Lit. 159. a.

No. VII.—P. 140.

The Statute of Circumspecté Agatis, *made* anno 18 Edw. I. stat. 4. *and* A. D. 1285.

Certain Cases wherein the King's Prohibition does not lie.

The king to his judges sendeth greeting. Use yourselves circumspectly in all matters concerning the Bishop of *Norwich* and his clergy, not punishing them if they hold pleas in court christian of such things as be meer spiritual, that is to wit, of penance enjoined by prelates for deadly sin, as fornication, adultery, and such like, for the which sometimes corporal penance, and sometimes pecuniary is enjoined, specially if a freeman be convict of such things. Also if prelates do punish for leaving the church-yard unclosed, or for that the church is uncovered, or not conveniently decked, in which cases none other penance can be enjoyned but pecuniary.

Item, If a parson demand of his parishioners obligations or tithes due and accustomed; or if any parson do sue against another parson for tithes greater or smaller, so that the fourth part of the value of the benefice be not demanded.

Item, If a parson demand mortuaries in places where a mortuary hath been used to be given.

Item, If a prelate of a church, or of a patron, demand of a parson a pension due to him, all such demands are to be made in a spiritual court. And for laying violent hands on a clerk, and in cause of defamation, it hath been granted already, that it shall be tried in a spiritual court, when money is not demanded; but a thing due for punishment of sin, and likewise for breaking an oath. In all cases afore rehearsed the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition.

No. VIII.—P. 143.

Articuli Cleri *made at* Lincoln, anno 9 Edw. II. stat. 1. *and* A. D. 1315.

Cap. I.—*No Prohibition shall be granted where Tithes be demanded where Money is paid for them.*

First, Whereas laymen do purchase prohibitions generally upon tithes, obventions, oblations, mortuaries, redemption of penance, violent laying hands on clerks or converts, and in cases of defamation, in which cases spiritual penance ought to be enjoined. The king doth answer to this article, that in tithes, oblations, obventions, mortuaries, (when they are propounded under their names,) the king's prohibition shall hold no place, although for the long withholding of the same, the money may be esteemed at a sum certain. But if a clerk or a religious man do sell his tithes being gathered in his barn, or otherwise to any man for money, if the money be demanded before a spiritual judge, the king's prohibition shall lie; for by the sale the spiritual goods are made temporal, and the tithes turned into chattles.

Cap. II.—*Debate upon the Right of Tithes exceeding the fourth Part. Enjoining Penance corporal or pecuniary.*

Also if debate do arise upon the right of tithes, having his original from

the right of the patronage, and the quantity of the same tithes do come unto the fourth part of the goods of the church, the king's prohibition shall hold place, if the cause come before a judge spiritual. Also if a prelate enjoin a penance pecuniary to a man for his offence, and it be demanded, the king's prohibition shall hold place. But if prelates enjoin a penance corporal, and they which be so punished will redeem upon their own accord such penances by money, if money be demanded before a judge spiritual, the king's prohibition shall hold no place.

Cap. V.—*No Prohibition where Tithe is demanded of a new Mill.*

Also if any do erect in his ground a mill of new, and after the parson of the same place demandeth tithe for the same, the king's prohibition doth issue in this form: *quia de tali molendino hactenus decimæ non fuerunt solutæ, prohibemus*, &c. *et sententiam excommunicationis, si quam hâc occasione promulgaveritis, revocetis omnino. The answer.*—In such case the king's prohibition was never granted by the king's assent, nor never shall, which hath decreed that it shall not hereafter lie in such cases.

No. IX.—P. 144.

18 Edw. III. Stat. 3. c. 7. A. D. 1344.

No Scire Facias *shall be awarded against a Clerk for Tithes.*

Item, whereas writs of *scire facias* have been granted to warn prelates, religious and other clerks, to answer dismes in our chancery, and to shew if they have any thing, or can any thing say, wherefore such dismes ought not to be restored to the said demandants, and of answer as well to us, as to the party of such dismes; that such writs from henceforth be not granted, and that the process hanging upon such writs be annulled and repealed, and that the parties be dismissed from the secular judges of such manner of pleas; saving to us our right, such as we and our ancestors have had, and were wont to have of reason. In witness whereof, at the request of the said prelates, to these present letters we have set our seal. Dated at *London*, the 8th day of July, the year of our reign of *England* the eighteenth, and of *France* the fifth.

No. X.—P. 144.

45 E. III. c. 3. Statute of *Silva Cædua.*

A prohibition shall be granted where a suit shall be commenced in a Spiritual Court for Silva Cædua.

Item, at the complaint of the said great men and commons, shewing by their petition, that whereas they sell their great wood of 20 years, or of greater age to merchants to their own profit, or in aid of the king in his wars, parsons and vicars of holy church do implead and draw the said merchants in the spiritual court for the tithes of the said wood, in the name of this word called *silva cædua*, whereby they cannot sell their woods to the very value, to the great damage of them and of the realm; it is ordained and established, that a prohibition in this case shall be granted, and upon the same an attachment, as it hath been used before this time.

No. XI.—P. 145.

50 Edw. III. A. D. 1376.—Rot. P. 190.

Petitions of the Clergy to Parliament, concerning prohibitions issued under the Statute of Silva Cædua.

AMONGST the petitions exhibited by the clergy and their answers, the first is,

Petition.—That all consultations may readily be granted in the suit for tithes of *silva cædua*, and that no attachment do ensue the same.

Answer.—A consultation granted doth suffice, and if need be, there may be a special clause for prohibitions granted, or to be granted.

Eodem Anno Rot. Parl. 141. The clergy pray, that although tithe of wood, especially *silva cædua*, is payable to God and the church, of divine and ecclesiastical right; yet, where the question before the ecclesiastical judge is merely upon the tithe of *silva cædua*, the king's prohibitions are directed to the party and the judge, and the due and long accustomed consultations are not granted, but are too much restrained by clauses, now of late subtilely invented against justice, so that the ecclesiastical judges, having conuzance in causes of *silva cædua*, from the dread of such clauses so lately inserted as aforesaid in consultations of this kind, will not dare to proceed, and although a sufficient consultation be granted, such as was wont to be granted anciently, a prohibition similar to the first is obtained again upon the same matter: and nevertheless, if afterwards a second consultation being previously obtained, the judge proceed any farther in the cause, an attachment is given against the judge, the advocate, and the party; notwithstanding such last consultation: wherefore the same clergy pray, that in a cause of *silva cædua*, due and customary consultations be granted without any difficulty and restriction whatever; that the aforesaid attachment, or any other molestation or disturbance in the secular court, cease, even after the first consultation granted; and that it may be lawful for the ecclesiastical judge after that, notwithstanding the king's prohibition may be afterwards obtained, to proceed with impunity, without offence to the king's majesty, and freely, without first obtaining another consultation.

Answer.—One consultation granted is sufficient by the law in the same cause or plaint, and if it be necessary, they shall have a special clause for prohibitions made, or to be made.

Rot. Parl. 51 Edw. III. No. 80. A. D. 1376-7.

The clergy pray, that whereas the tithes of wood called *silva cædua*, are to be paid to God and holy church of divine right, and the right of holy church, nevertheless, where process is hanging of such kind of tithes before judges of holy church, the king's prohibitions are directed to the judges and parties, and the consultations due and according to the laws of holy church, as in the articles and petitions following is more fully contained, are not granted; wherefore the said prelates and clergy pray, that in cases of tithes of such manner of sylva cædua due consultations be granted, without any difficulty whatsoever.

Answer.—Let the law thereof be used as herctofore it hath reasonably been.

No. XII.—P. 146.

1 Ric. II. c. 13. A. D. 377. Cap. XIII.

Ecclesiastical Judges shall not be vexed for suits for Tithes in a Spiritual Court.

Item, the prelates and clergy of this realm do greatly complain them, for that the people of holy church, pursuing in the spiritual court for their tithes, and their other things which of right ought, and of old times were wont to pertain to the same spiritual court, and that the judges of holy church, having cognizance in such cases, and other persons thereof meddling according to the law, be maliciously and unduly for this cause indicted, imprisoned, and by secular power horribly oppressed, and also enforced with violence by oaths and grievous obligations, and many other means unduly compelled to desist and cease utterly of the things aforesaid, against the liberties and franchises of holy church. Wherefore it is assented, that all such obligations made or to be made by duress or violence shall be of no value. And as to those, that by malice do procure such indictments, and to be the same indictors, after the same indictees be so acquit, such procurers shall have and incur the same pain that is contained in the statute of Westminster, the second of those which procure false appeals to be made. And the justices of assizes, or other justices before whom such indictees shall be acquit, shall have power to inquire of such procurers and indictors, and duly punish them according to their desert.

No. XIII.—P. 146.

1 Ric. II. c. 14. A. D. 1377.

In an Account of Goods taken away, the Defendant maketh Title for Tithes due to the Church.

Item, it is accorded, that at what time that any person of the holy church be drawn in plea in the secular court for his own tithes taken, by the name of goods taken away, and he which is so drawn in plea maketh an exception, or allegeth, that the substance and suit of the business is only upon tithes due of right and of possession to his church, or to another his benefice, that in such case the general averment shall not be taken without shewing specially how the same was his lay-chattel.

No. XIV.—P. 146.

Rot. Parl. 1 Ric. II. A. D. 1377. No. 121. Rot. Parl. No. 121. *Eodem Anno.*

Petitions to Parliament concerning Silva Cædua.

The clergy pray, that all manner of tithe of wood called *silva cædua*, due to God and holy church, be lawfully paid. And in case the king's prohibition be delivered to the judge, or party, in a cause upon such kind of tithe, that a full and plenary consultation, without any new or undue restitution in this behalf be forthwith granted; and that the judges proceeding, the parties pursuing, and all others whosoever doing their duty on this part, be not for this cause hindered or aggrieved by indictments, imprisonments, condemnations, or in any other manner whatsoever.

Answer.—Let it be done in this case as hath been used before these days.

Rot. Parl. 2 R. II. No. 19. A. D. 1379.

The commons shew, that great mischief is done by persons of holy church who demand tithes of all manner of wood, by colour of *silva cædua*, and wrongfully harrass them in divers parts of the kingdom, by grievous summonses before judges of holy church, so that by such summonses and grievances they pay tithes of great trees, and also for timber which they fell for the repairing of their houses, and for fuel, whereas they were not wont nor ought to pay them of right; but the said commons, from not being able, and from the great favour which the said persons of holy church have before the judges, and for that the judges are parties in such cases, submit to the wrong, in order to avoid greater mischief in future, which has often been done to the said commons heretofore: wherefore they pray remedy, that *silva cædua* be declared in other manner than the clerks have heretofore declared it for their profit, without the assent of the lords, and that it be ordained to be of underwood, or wood of a certain age under ten years; (for before the first pestilence no tithes of any manner of wood were given, granted or demanded;) and that thereupon every man may have a prohibition upon his case; for those of the chancery intend, that of whatsoever age the wood may be, if tithe thereof be required, a prohibition doth not lie thereupon.

Answer.—Be it used as it reasonably hath been before this time.

7 R. II. A. D. 1384.

It was agreed before the king's council, in a parliament holden at *Salisbury*, that consultations ought to be granted of *silva cædua*, notwithstanding it is not renewed annually. And thereupon a consultation was awarded for the abbot of *Notley*, in a case of *silva cædua*.

Rot. Parl. 8 R. II. No. 21. A. D. 1384.

The commons pray, that whereas it is ordained by statute, that a general prohibition shall be granted in chancery, wherever men advanced to benefices of holy church demand tithes in court christian of great wood which is passed the age of twenty, thirty, or forty years, when such wood is cut and sold; and because no special prohibition is granted by the said statute, the said men of holy church sue in court christian for the tithes aforesaid, notwithstanding such general prohibition directed to them, to the great damage and mischief of those who sell their wood in the form aforesaid; may it please our lord the king, to grant a special prohibition, with attachments thereupon, against the ordinaries and those who sue against the statutes as aforesaid.

Answer.—Be it done as was heretofore ordained by the statute made at *Westminster*, in the 45th year of the reign of our grandfather, whom God have mercy upon.

Rot. Parl. 14 R. II. No. 29. A. D. 1390.

The commons of the land pray, that whereas parsons and vicars claim and demand of the said commons tithes of wood, that is, as well of wood of the age of 40 or 60 years, as of the age of 9 or 10 years, and sue and emplead them in court christian, to the great travail, cost, and loss of the said commons, notwithstanding the statute before these times thereof ordained, by reason that the words *silva cædua* are not expounded nor declared in certain; may it therefore please our lord the king to ordain, that the said words *silva cædua* may be declared, determined, and ascertained, that the country, which hath been duly titheable from the 20th year of

king *Edward*, since the conquest, be charged with such tithes according to the tenor of a statute thereof made before these days, and not otherwise, so that the said commons may be certain of what manner of wood they ought to pay tithes, at the final discussion of the aforesaid debates.

Answer.—Be it as it hath been heretofore.

No. XV.—P. 146.

15 Ric. II. c. 6.

In Appropriation of Benefices there shall be Provision made for the Poor and the Vicar.

Item, because divers damages and hindrances oftentimes have happened, and daily do happen to the parishioners of divers places, by the appropriation of benefices of the same places; it is agreed and assented, that in every licence from henceforth to be made in the chancery, of the appropriation of any parish church, it shall be expressly contained and comprized that the diocesan of the place, upon the appropriation of such churches, shall ordain according to the value of such churches, a convenient sum of money to be paid and distributed yearly of the fruits and profits of the same churches, by those that shall have the said churches in proper use, and by their successors, to the poor parishioners of the said churches, in aid of their living and sustenance for ever; and also that the vicar be well and sufficiently endowed.

No. XVI.

2 Henry IV. c. 4.

The Penalties for purchasing of Bulls to be discharged of Tithes.

Item, forasmuch as our lord the king, upon grievous complaint to him made in this parliament, hath perceived, that the religious men of the order of *cisteaux* in the realm of *England*, have purchased certain bulls to be quit and discharged to pay the tithes of their lands, tenements, and possessions, let to ferm or manured, or occupied by other persons than by themselves, in great prejudice and derogation of the liberty of holy church and of many lege people of the realm; our lord the king willing thereupon to ordain remedy by the advice and assent of the lords spiritual and temporal, and at the instance and request of the said commons hath ordained and established, that the religious persons of the order of *Cisteaux* shall stand in the estate that they were before the time of such bulls purchased; and that as well they of the said order, as all other religious and seculars, of what estate or condition they be, which do put the said bulls in execution, or from henceforth do purchase other such bulls new, or by colour of the same bulls purchased, do take advantage in any manner, that process shall be made against them, and every of them by garnishment of two months, by writ of *præmunire facias*; and if they make default, or be attainted, then they shall incur the pains and forfeitures contained in the statute of provisors, made the 13th year of the said king Richard.

No. XVII.—P. 147.

Rot. Parl. No. 93. A. D. 1401.

Item, the commons pray, that whereas divers men of holy church emplead many liege subjects of the realm in court christian for tithes of agistment of certain lands, meadows, pastures, and wastes, which have not been titheable of agistment before these days; that is to say, of lands sown, and meadows the same year after they have taken their tithes of corn and hay, and of pastures and wastes which have at no time been titheable for agistment, where the said persons of holy church take their tithes continually of lambs, calves, and other such manner of tithes coming and being upon the said lands, meadows, pastures, wastes, to the great damage and disseisin, as well of lords as of others, poor tenants of the commons of the realm: may it please our lord the king, in this present parliament to make declaration, whether the said tithes of agistment shall be paid or not, and to order a prohibition or other due remedy against the persons of holy church, who shall serve such pleas in court christian, against any of the liege subjects of the king, against right, law, and reason.

Answer.—Let him who shall find himself griéved sue specially.

No. XVIII.—P. 147.

4 Hen. IV. c. 12. A. D. 1403.

In Appropriations of Benefices, Provision shall be made for the Poor and the Vicar.

Item, it is ordained, that the statute of appropriation of churches, and of the endowment of vicars in the same, made the 15th year of King *Richard* the second, be firmly holden and kept, and put in due execution; and if any church be appropriated by licence of the said King *Richard*, or of our lord the king that now is, sithence the said 15th year, against the form of the said statute, the same shall be duly reformed according to the effect of the same statute, betwixt this and the feast of Easter next coming. And if such reformation be not made within the time aforesaid, That the appropriation and licence thereof be made void, and utterly repeeled and adnulled for ever; except the church of *Hadenham* in the diocess of *Ely*, which, for to eschew divers damages, discords, and debates, that have been before this time, betwixt the Bishop of *Ely* and the Archdeacon of *Ely*, upon the exercise of their jurisdiction, (as it was openly declared by the same bishop, in presence of the king and of the lords in parliament) was of late appropriated by the licence of the king our lord, to the archdeacon and his successors, to do divine service, keep hospitality and to support other charges as pertaineth. Moreover, it is ordained and established, that all the vicarages, united, annexed, or appropriated, and the licences thereof had after the first year of the said King *Richard*, how well soever that they which have united, annexed, or appropriated such vicarages, be in possession of the same vicarages, or by virtue of such licenses may in anywise be in possession of the same in any time to come, they shall be also utterly void, revoked, repealed, adnulled, and disappropried for ever; and that from henceforth in every church so appropried, or to be appropried, a secular person to be ordained vicar perpetual, canonically institute and induct in the same, and covenably endowed by the discretion of the ordinary, to do di-

vine service, and to inform the people, and to keep hospitality there, except the church of *Hadenham* aforesaid; and that no religious be in anywise made vicar in any church so appropried, or to be appropried by any means in time to come.

No. XIX.—P. 147.

5 Hen. IV. c. 11. A. D. 1404.

The Fermors of Aliens shall pay their Tithes to the Parson of the same Parishes.

Item, it is ordained and established, that the fermors, and all manner of occupiers of the manors, lands, tenements, and other possessions of aliens, shall pay and be bound to pay all manner of *dismes* thereof, due to parsons and vicars of holy church, in whose parishes the same manors, lands, tenements, and possessions, be so assessed and due, as the law of holy church required, notwithstanding that the said manors, lands, tenements or other possessions be seized in the king's hands, or notwithstanding any prohibition made or to be made to the contrary.

No. XX.—P. 147.

5 H. IV. Rot. Parl. No 65. A. D. 1403-4.

Petitions to Parliament, de silva cædua, *Prohibitions in officiate Vicarages, and other abuses of Appropriations.*

The commons pray, that whereas many liege subjects of our lord the king are oftimes vexed and travailed by parsons and vicars of holy church, by citations and censures of holy church, for tithes of stones and slates opened and drawn out of quarries, no tithes having ever been demanded or paid of such stone or slate; that it may please the lord the king to ordain, that if any prohibition be granted in such case, no consultation may be awarded to the contrary.

Answer.—The king will advise upon it.

Rot. Parl. No. 74. *Eodem Anno.*

That the noble ordinances and statutes made in the 4th year of the reign of our lord the king, concerning the appropriations of parochial churches, and the endownments of vicarages therein, may stand in their force and effect, and put in due execution; and that if any letters patent be or shall be made to the contrary, they be avoided and holden for null.

Answer.—Let the statutes thereof made be holden and kept.

Rot. Parl. 7 and 8 H. IV. No. 113. A. D. 1406.

The commons pray, that it be ordained and established in this present parliament, that if any person, religious or secular, of what estate or condition soever he be, by colour of any bulls containing privilege to be discharged of tithes appurtenant to parish churches, prebends, hospitals, or vicarages, purchased before the first year of the reign of king *Richard*, late king of *England*, the second since the conquest, not executed, have disturbed and will not suffer, or, by any bulls hereafter to be purchased, disturb and do not suffer any person of holy church, whether he be parson of a church, prebendary of a prebend, warden of an hospital, vicar, or other person whatsoever, to take and enjoy the tithes anciently due to the same churches,

prebends, hospitals, vicarages, or other benefices of holy church, that the same disturbers be punished by such process and penalty as is ordained by the statute of the second year of the reign of our lord the now king, against those of the order of *Cistertians*.

Answer.—The king wills, that no person, of what estate or condition soever he be, put in execution any such bulls purchased before the first year of king *Richard* the second, or since, or any such bulls to be purchased in time to come; and that if henceforth any person, religious or secular, of what estate or condition soever he be, by colour of such bulls disturb any such persons of holy church, so that they cannot take and enjoy the tithes due to them, and belonging to their said benefices, that such disturber incur such process and pain as is ordained by the statute of the second year of our lord the now king, against those of the order of *Cistertians*.

Rot. Parl. 2 H. V. No. 7. A. D. 1414.

The commons pray, that whereas they are often empleaded in court christian for tithes of great wood of the age of 20 years, and of 40 years, and more, by the name of these words *silva cædua*; and in the statute made in the time of king *Edward*, the great grandfather of the lord the now king, in the 45th year of his reign, it is contained, that a prohibition be granted in this case, and thereupon an attachment, as it hath been used before these days; by which statute no full declaration is made what wood is titheable, and what not, wherefore the justices of the land are of different opinions upon this matter; that it please our lord the king to limit and ordain, by the advice of the lords of this present parliament, that all manner of wood, which is of the age of 20 years or more, shall not be titheable in any manner for the time to come; and if it be under the age of 21 years it shall be titheable, if the custom of the country, where such wood is growing, demands it, and that in this case there be a prohibition, and thereupon an attachment, without granting a consultation.

Answer.—Because the matter of the petition requires great and mature deliberation and declaration, the king wills, that the said matter be adjourned, and remitted to the next parliament; and that the clerk of the parliament cause this article to be brought before the king and lords at the beginning of the next parliament, in order that a declaration may be had thereupon.

Rot. Parl. 10 Hen. VI. No. 12. A. D. 1432.

The commons, after reciting in their petition the statute of 4 H. IV. proceed thus, "and forasmuch as in that statute no penalty is imposed upon those who have churches to their own use, in case they suffer the vicarages therein to be inofficiate, and therefore in several parts of the kingdom they have suffered the said vicarages, by the insufficient endowment thereof, and for their own gain, to be inofficiate and void for several years, by reason whereof, in many parishes in the kingdom, old men and women have died without confession, or receiving any other sacrament of holy church, and infants have died without baptism, whereby several mischiefs and inconveniencies from day to day happen, to the great dishonour of holy church;" they therefore pray, "That it may be ordained by this present parliament, that if any religious or man of holy church, of what estate or condition soever he be, who have or hold any churches to their own use, hereafter suffer the vicarages of such churches to be inofficiate, without a resident vicar thereon, for six months; that the same churches so holden to their own use, with all their appurtenances and dependencies, be absolutely dis-

appropriated and disamortised for ever, saving only to the said religious and men of holy church their patronage therein, as they had before any appropriations were made of the said churches, or they were holden to their proper use, without having or retaining any pension, portion, annuity, or other charge whatsoever, and saving to the ordinaries their right by lapse.

Answer.—The king will advise upon it.

Rot. Parl. *Eodem Anno.* No. 17.

The commons, after reciting in their petition the statute of E. III. say, That now so it is, that divers liege subjects of our lord the king are empleaded and travailed in court christian for tithes for the said causes, who thereupon come into the chancery of our lord the king, in order to have a writ of prohibition and of attachment according to the effect of the said statute, which writs are denied to them, against law and right; wherefore that it may please our lord the king, by the advice and consent of the lords spiritual and temporal, in this present parliament, to ordain, by the authority of the same parliament, that those persons who feel themselves aggrieved against the ordinance of the said statute, may have writs of prohibition and attachment thereupon, according to the effect of the said statute; and in case any such prohibition or attachment be denied to any of his liege subjects in the chancery of our lord the king, that then such writs of prohibition and attachment be granted as well in the bench of our lord the king, as in the common bench; and that the writs of prohibition and attachment issuing out of those benches may have the same force and effect, as the original writs of prohibition and attachment so issuing out of the chancery of our lord the king.

Answer.—Let the statute before made be kept and executed according to the tenor thereof.

No. XXI.—P. 148.

26 Hen. VIII. c 3. A. D. 1534.

The bill for the First Fruits, with the yearly Pensions to the King.

Sec. 1. "Forasmuch as it is, and of very duty ought to be the natural inclination of all good people, like most faithful, loving, and obedient subjects, sincerely and willingly to desire to provide, not only for the public weal of their native country, but also for the supportation, maintenance, and defence of the royal estate of their most dread, benign, and gracious sovereign lord, upon whom, and in whom dependeth all their joy and wealth: in whom also is united and knit so princely a heart and courage, mixed with mercy, wisdom, and justice: and also a natural affection joined to the same, as by the great, inestimable, and benevolent arguments thereof being most bountifully, largely, and many times shewed, ministred, and approved towards his loving and obedient subjects, hath well appeared: which requireth a like correspondence of gratitude to be considered, according to their most bounden duties. Wherefore his said humble and obedient subjects, as well the lords spiritual and temporal, as the commons in this present parliament assembled, calling to their remembrance, not only the manifold and innumerable benefits, daily administred by his highness to them all, and to all other the residue of his subjects of this realm: but also how long time his majesty hath most victoriously, by his high wisdom and policy, protected, defended, and governed this his realm,

and maintained his people and subjects of the same in tranquility, peace, unity, quietness and wealth. And also considering what great, excessive, and inestimable charges his highness hath heretofore been at, and sustained, by the space of five and twenty whole years, and also daily sustaineth for the maintenance, tuition, and defence of this his realm, and his loving subjects of the same, which cannot be sustained and born without some honourable provision and remedy may be made, found, provided, and ordained for maintenance thereof: do thereby desire and most humbly pray, that for the more surety of continuance and augmentation of his highness's royal estate, being not only now recognized (as he always indeed hath heretofore been) the only supreme head in earth, next and immediately under God, of the church of *England*, but also their most assured and undoubted natural sovereign liege lord and king, having the whole governance, tuition, defence, and maintenance of this his realm, and most loving obedient subjects of the same. It may therefore be ordained and enacted by his highness, and the lords spiritual and temporal, and the commons in this present parliament assembled, and by authority of the same, in manner and form following.

Sect. 2. "That is to say, that the king's highness, his heirs and successors, kings of this realm, shall have and enjoy from time to time to endure for ever, of every such person and persons, which at any time after the first day of January next coming shall be nominated, elected, prefected, presented, collated, or by any other means appointed, to have any archbishoprick, bishoprick, abbacy, monastery, priory, college, hospital, archdeaconry, deanry, provostship, prebend, parsonage, vicarage, chauntrie, free-chapel, or other dignity, benefice, office, or promotion spiritual within this realm, or elsewhere within any of the king's dominions, of what name, nature, or quality soever they be, or to whose foundation, patronage, or gifts soever they belong, the first fruits, revenues and profits for one year of every such archbishoprick, bishoprick, abbey, monastery, priory, college, hospital, archdeaconry, deanry, provostship, prebend, parsonage, vicarage, chauntry, free-chapel, or other dignity, benefice, office, or promotion spiritual aforenamed, whereunto any such person or persons after the said first day of January, be nominated, elected, prefected, presented, collated, or by any other means appointed. And that every such person and persons, before any actual or real possession, or medling with the profits of any such archbishoprick, bishoprick, abbacy, monastery, college, hospital, deanry, provostship, prebend, parsonage, vicarage, chauntrie, free-chapel, priory, or other dignity, benefice, office, or promotion spiritual, shall satisfy, content, and pay, or compound or agree to pay to the king's use, at reasonable days, upon good sureties, the said first fruits and profits for one year.

Sect. 3. "And be it also enacted by authority aforesaid, that the chancellor of *England*, and master of the rolls for the time being, jointly and severally, or such other person and persons as shall please the king's highness, his heirs or successors from time to time, at his or their pleasure, to name and depute by commission or commissions under the great seal, shall have power and authority, as well to examine and search for the true just and true value of the said first fruits and profits by all ways and means that they can, as to compound and agree for the rate of the said first fruits and profits, as to stall and limit reasonable days of payment thereof upon good and sufficient surety or sureties, by writings obligatory by their discretions. And if composition or agreement be had or made for the said first fruits before the said lord chancellor, or master of the rolls, that then the writings obligatory, or money taken for the same, shall rest, remain, and abide in

the hanaper of the king's chancery, there safely to be kept to the king's use, and the money to be due of such writings obligatory or to be received in hand by reason of any such composition, shall be paid in the said hanaper, to the clerk of the hanaper for the time being. And that the said clerk of the hanaper, shall make a true and a just account thereof, like as he is bound to do of the money received of the profits of the king's great seal. And if composition or agreement be had or made for the said first fruits, afore any other person or persons to be deputed to the king's highness, his heirs or successors by commission under his great seale, that then the writings obligatory, and money taken for the same, shall be delivered to the treasurer of the king's most honourable chamber for the time being, or elsewhere, to whom it shall please the king's highness, his heirs or successors, to give authority by commission under the great seal, to receive the same.

Sect. 4. "And it is also ordained and enacted by authority aforesaid, that every writing of acquittance subscribed with the hand and name of the clerk of the hanaper, and treasurer of the chamber, or other commissioners aforesaid, or any of them, witnessing the receipt of the said first fruits, or any part thereof, shall be as good and effectual against the king's highness, his heirs and successors, to every person and persons having the same, for so much money as shall be mentioned to be received and contained in every such acquittance, as if such acquittance were, or had been lawfully had and obtained in the king's name under the king's great seal, and so shall be admitted, accepted, allowed, and taken in every of the king's courts. And that all writings obligatory to be taken for payment of the said first fruits, by, and afore the said lord chancellor, or master of the rolls, or by and afore any other person or persons, to be deputed to compound and agree for the said first fruits, as is aforesaid, shall be of the same strength, force, vertue, quality, and effect to all intents and purposes as writings obligatory heretofore made by any lay person by authority of the statute of the *Staple-Inn*. And that upon certificate hereafter to be made into the king's chancery, of any such writings obligatory to be taken for payment of such first fruits, like process and execution shall be thereupon made against any person spiritual and temporal, as hath been accustomed to be made against any lay person upon certificate of writings obligatory of the said statute of the staple. And that no person shall be compelled to pay for any writing obligatory to be made for the said payment of the said first fruits, above eight-pence, nor for any acquittance to be made for receipt of such first fruits above four-pence. And that such person and persons as shall be deputed by the king's highness by commission under the great seal, to compound and agree for the said first fruits, shall at the end of every six months next after the date of their commission, and so from six months to six months, deliver or cause to be delivered unto the treasurer of the chamber for the time being, or elsewhere, to such commissioners as shall be appointed, as aforesaid to receive the same, as well such money, as all such specialties and bonds as they shall have taken for the payment of the said first fruits by indenture to be made between them and the said treasurer, or other commissioners as is aforesaid, containing the certainty and number of the sums of money, and specialties and bonds by them taken and received. And if any person or persons to whom any deputation shall be made by commission, to compound and agree for the payment of the said first fruits, their heirs, executors, or administrators, conceal, or imbezil any of the said specialties or bonds taken for the sure payment of the said first fruits, and do not deliver them according to the tenor of this act, that then every such offender shall

forfeit that office of deputation, and over that make fine and ransom at the king's own pleasure and will.

Sect. 5. "And it is also enacted by authority aforesaid, that if any person or persons which at any time after the said first day of *January*, shall be nominated, elected, prefected, presented, collated, or by any other means appointed to any of the dignities, offices, benefices, or other promotions spiritual before-mentioned, do enter into the actual and real possession thereof, or meddle with the profits thereof, before they shall have truly satisfied, and paid to the king's use the first fruits and profits thereof for one year, or else shall have agreed or compounded for payment of the same at reasonable days upon good securities, in manner and form as by this act is above specified, that then every such person and persons so doing and offending, and being thereof convict by presentment, verdict, confession, or witness before the said lord chancellor, or such other as shall have authority by commission, to compound for the said first fruits and profits as is aforesaid, shall be accepted and taken an intruder upon the king's possession. And that they, their executors, or administrators, shall pay to the use of the king's highness for every such offence, so much sums of money, as shall amount to the double value of the said first fruits and profits of such dignities, benefices, or other spiritual promotions wherein they shall so enter, and intrude before the payment of the said first fruits and profits for one year thereof, or before due agreement made for the same in manner and form as is above rehearsed.

Sect. 6. "And be it further enacted by authority aforesaid, that the first fruits of benefices heretofore accustomed to be paid to the bishop of *Norwich* within his diocese, and to the archdeacon of *Richmond* within his archdeaconry, or to any other person or persons within this realm, or any other the king's dominions, shall from the said first day of *January* cease and be extinct, and no longer be paid, but only to the king's highness, his heirs and successors, in such form as is above-mentioned in this act.

Sect. 7. Provided always, that archbishops and bishops, and all other having jurisdiction, ordinary, may give and deliver letters of institution and induction, as they might do before the making of this act, without any offence of any article contained in this act, any thing in this act contained to the contrary thereof notwithstanding.

Sect. 8. "Provided also, that where there be divers cells appertaining to monasteries and priories, and that the priors of such cells be named and removeable from time to time, at the only wills and pleasures of their masters and sovereigns of the monasteries and priories, whereunto such cells belong: that the priors of such cells shall not be compelled to pay any first fruits, by virtue or authority of this act: any thing in this act contained to the contrary thereof notwithstanding: but that the first fruits and profits of every such cell shall be paid to the king's highness, his heirs and successors, whensoever and as often as any person shall be nominated, elected, prefected, or collated to the monastery or priory, whereunto such cells belong.

Sect. 9. "And over this be it enacted by authority aforesaid, that the king's majesty, his heirs and successors, kings of this realm, for more augmentation and maintenance of the royal estate of his imperial crown and dignity of supreme head of the church of England, shall yearly have, take, enjoy, and receive, united and knit to his imperial crown for ever, one yearly rent, or pension, amounting to the value of the tenth part of all the revenues, rents, farms, tithes, offerings, emoluments, and of all other profits, as well called spiritual as temporal, now appertaining or belonging, or that hereafter shall belong to any archbishoprick, bishoprick, abbacy,

monastery, priory, archdeaconry, deanry, hospital, college, house collegiate, prebend, cathedral church, collegiage church, conventual church, parsonage, vicarage, chauntry, free-chapel or other benefice or promotion spiritual, of what name, nature, or quality soever they be, within any diocess of this realm, or in *Wales*, the said pension or annual rent to be yearly paid for ever to our said sovereign lord, to his heirs and successors kings of this realm, at the feast of the nativity of our Lord God, and the first payment thereof to begin at the feast of the nativity of our Lord God, which shall be in the year of our Lord God, MDXXXV. And to be paid yearly by such as shall be appointed to have the collection thereof by this act, in such manner and form as shall hereafter be limited by this act, before the first day of *April* yearly next following, after the said feast of the nativity of our Lord.

Sect. 13. "And it is ordained and enacted by authority aforesaid, that the said yearly rent and pension shall be taxed, rated, levied, perceived, and paid to the King's use, his heirs and successors, in manner and form hereafter to be declared by this act. That is to say, that the Chancellor of *England* for the time being, shall have power and authority to direct into every diocess in this realm and in *Wales*, several commissions in the King's name, under his great seal, as well to the archbishop or bishop of every such diocess, as to such other person or persons as the King's Highness shall name and appoint, commanding and authorising the said commissioners to be named in every such commission, or three of them at the least, to examine, search and enquire by all the ways and means that they can by their discretions, of and for the true and just, whole and entire yearly values of all the manors, lands, tenements, hereditaments, rents, tithes, offerings, emoluments and all other profits as well spiritual as temporal, appertaining or belonging to any archbishoprick, bishoprick, abbacy, monastery, priory, archdeaconry, deanry, hospital, college, house collegiate, prebend, cathedral church, collegiate church, conventual church, parsonage, vicarage, chauntry, free-chapel, or of any other benefice or promotion spiritual within the limits of their commission, with a clause to be contained in every such commission, that the said commissioners, or three of them at the least, shall deduct and allow in the making and rating of the said yearly values of the premises, these deductions following and none other: that is to say, the rents resolute to the chief lords, and all other annual and perpetual rents and charges, which any spiritual person or persons been bounden yearly to pay to any person or persons, to their heirs and successors for ever, or to give yearly in alms by reason of any foundation or ordinance, and all fees for stewards, receivers, bailiffs, and auditors, and synods, and proxies, with another clause to be also contained in every such commission, that the said commissioners, or three of them at the least, shall certify under their seals at such days as shall be limited by the said commissioners, as well the whole and entire value, as the deductions aforesaid of every archbishoprick, bishoprick, abbacy, monastery, priory, archdeaconry, deanry, hospital, college, house collegiate, prebend, cathedral church, conventual church, parsonage, vicarage, chauntry, free-chapel, and all other benefits and promotions spiritual.

Sect. 11. "And it is ordained and enacted by authority aforesaid, that the said commissioners that shall be so appointed, or three of them at the least, shall have full power and authority to do, accomplish, and execute the effects and contents of their said commissions in every behalf: and that every the said commissioners, before they shall execute the said commission, shall receive and take a corporal oath before the lord chancellor, or before such other as shall be appointed by the said chancellor, by the king's writ of *dedimus potestatem*, that they shall diligently and truly, without la-

vour, affection, fraud, cunning, meed, dread, or corruption, do fulfil and execute the whole effects and contents expressed in every such commission within the limits thereof, to the cunning, wits and uttermost of their powers.

Sect. 12. "And it is ordained and enacted by authority aforesaid, that after such certificate made by the said commissioners, the said yearly rent and pension of the tenth part shall be set, taxed, rated, and taken justly, and truly, and indifferently by the treasurer, chancellor, chamberlain, and barons of the king's Exchequer, off and out of the clear yearly value of the premises, that shall be above the deductions afore mentioned, and none otherwise. And that every archbishoprick, bishoprick, abbacy, monastery, priory, archdeaconry, deanry, hospital, college, house collegiate, prebend, cathedral church, collegiate church, conventual church, parsonage, vicarage, chauntry, free-chapel, or other benefice or promotion spiritual, shall be severally and distinctly taxed, charged, and chargeable in the proper diocess where they been, for the payment of such portion of the said tenth part as shall be taxed and set upon them by authority of this act. That is to say, every of them by and for themselves, shall be taxed, charged, and chargeable in the proper diocess, where they been, for the tenth part of the yearly value of their possessions and profits to them belonging, wheresoever their said possessions and profits shall happen to be, or lye in any part of this realm, or elsewhere, in any of the king's dominions, and that none of them shall be charged or chargeable for the payment of the other charge or portion

Sect. 13. "And it is also enacted by authority aforesaid, that after such certificate made into the king's Exchequer, and tax set of the tenth part, in form above remembered, every archbishop and bishop now being, and that hereafter shall be, shall be charged and chargeable, to levy, collect, and receive within their proper diocesses, as well in places exempt, as not exempt, all such sums of money, wherewith the dignities, benefices, and other promotions spiritual afore-mentioned within their diocess, chargeable by this act, shall be set, taxed, and charged towards the payment of the said yearly pension, and shall pay and content the said sums of money, yearly, before the said first day of *April*, to the treasurer of the king's chamber, for the time being, or to any other person or persons, whom it shall please the king's highness to appoint to receive the same. And that every of the said archbishops and bishops, their executors and administrators, and the possessions of their dignities and churches, shall stand charged and chargeable, for the sure and true payment of such sums of money, as they shall collect and receive of the said yearly rent and pension.

Sect. 14. "And that the treasurer, chancellor, chamberlain, and barons of the king's Exchequer, shall yearly cause process to be made by their discretions for non-payment of the said pension, or yearly rent, or any parcel thereof, against every archbishop and bishop of this realm, that is to say, against every archbishop and bishop for so much part and portion of the said pension and yearly rent, wherewith the dignities, benefices, and other promotions spiritual aforementioned within the diocess, shall be taxed and charged, so that every of the said archbishops and bishops shall be charged and chargeable, for the rate and portion of the said yearly rent and pension, set and taxed within his own particular diocess, and none otherwise.

Sect. 15. "And be it also enacted by authority aforesaid, that every archbishop, and bishop, shall have power and authority to levy, take, and perceive by authority of censures of the church, or by distress or otherwise

by their discretion, all such sums of money as shall be rated, taxed, and set to go out of the lands, tenements, hereditaments, profits, and emoluments of any dignity, office, benefice, or other place or promotion spiritual, within their diocess, towards the payment of the said yearly rent and pension: and that no replevin, prohibition, nor supersedeas, upon any excommunication, nor any other writ or impediment shall be sued, allowed, or obeyed, for any person or persons, making default of payment of such part and portion, as they shall be rated and taxed unto by authority of this act, till such time as they have truly satisfied their said part and portion to them allotted of the said yearly rent and pension.

Sect. 16. "And it is also enacted by authority aforesaid, that whensoever, and as often as any of the archbishopricks or bishopricks happen to be void, that then the dean and chapter of the cathedral church, or the prior and convent, or chapter, or convent of the monastery or cathedral church, where the see of such archbishoprick or bishoprick, being void, shall happen to be, during the time of the vacation thereof, and their executors, administrators, and possessions shall be charged and chargeable to do, and cause to be done, all and every thing and things, for the due executions of this act, within the diocess of such archbishoprick or bishoprick being void, as the same archbishop or bishop of the see being void, should have done, according as it is limited and appointed by this act, or by any thing therein contained.

Sect. 17. "And it is ordained and enacted by authority aforesaid, that if any sum of money being once due by any incumbent of any of the dignities, benefices, or promotions spiritual afore specified, charged to the payment of the said yearly pension and annual rent, be reasonably demanded and required any time after the said feast of the nativity of our Lord, at their dignities, monasteries, priories, hospitals, colleges, churches, chanteries, or houses, by the archbishop or bishop, or such as shall be charged with the collection of any part of the said pension, or by any other their ministers, servants or officers, to pay such portion of the said pension and yearly rent, as they shall be taxed and assessed, be not truly contented and paid unto such archbishop or bishop, or their ministers and officers, and to such other person or persons, or their ministers or servants, as shall have the charge of collection thereof, every year yearly at the time of such request and demand thereof, or else within forty days next after every such request at the furthest, that then every incumbent, making such default of payment, after such default thereof certified into the king's Exchequer in writing under the seals of any archbishop or bishop, or of such as be limited and charged to the collection of the said pension by this act, shall be adjudged, deprived, *ipso facto*, of all such dignities, benefices, pensions, and promotions spiritual, as any such incumbent, making such default, shall have at the time of such certificate to be made, or at any time after. So that all such dignities, benefices, pension, and promotion spiritual, which any incumbent, making such default of payment, shall have at the time of any such certificate to be made, or at any time after, shall be clearly void and destitute of incumbent in the law to all intents and purposes, as if such incumbent making such default of payment were dead indeed.

Sect. 18. "And it is ordained and enacted by authority aforesaid, that if any archbishop or bishop, or any other limited and charged by this act, to the collection and payment of the said pension and annual rent, do make a certificate unto the king's Exchequer, before the said first day of *April*, or at any time within four and twenty days next after the said first day of *April*, that they according to this act have reasonably required and de-

manded any incumbent of any dignity, benefice, or promotion spiritual, chargeable by this act to pay such part and portion of the said pension and annual rent, as they shall happen to be assessed unto, and that such incumbent, so being required, hath not paid his said part and portion, according to the form and effect of this act, that then every such archbishop and bishop, and every other person having the charge by this act, for collection and payment of the said pension and annual rent, upon every such certificate, shall be discharged and acquitted for ever against the king, his heirs and successors, of and for all such sums of money, as any such incumbent, against whom such certificate shall be made, should or ought to have paid by this act. And that then in every such case the treasurer, chancellor, chamberlain, and barons of the king's Exchequer, shall devise and direct upon every such certificate, such process out of the king's Exchequer, against every such incumbent, against whom any such certificate shall be made, and their executors and administrators, or, for insufficiency of them, against the successors of every such incumbent, whereby the king's highness, his heirs and successors, shall and may be truly answered, paid and contented, of such portion and part as the incumbent, against whom any such certificate shall be made, was taxed and assessed for his dignities, benefices, or promotion spiritual, chargeable by this act.

Sect. 19. "And it is also ordained and enacted, by authority aforesaid, that all manner of acquittances, made by the treasurer of the king's chamber, or by any other such commissioners, as shall be appointed, as is aforesaid, to receive the said pension, or any part thereof, and subscribed with the name of the said treasurer, or any other such commissioners for the payment of the said pension or annual rent, or any part thereof, to any such person or persons as be limited and charged with the collection thereof, shall be of as good strength, force, virtue, and effect to the parties having the same, as if they were made in the king's name under his great seal, and so shall be allowed, admitted, and accepted in all courts of this realm: and that the treasurer, chancellor, chamberlain, and barons of the king's Exchequer, shall, by virtue and authority of this act, as well admit and allow such acquittances, as all such certificates as shall be made against any such incumbent for default of payment, as is above said, upon the account of every archbishop and bishop, and of every other person limited and charged by this act, for the collection and payment of the said pension and annual rent, without any writ, bill, or warrant to be sued in or for that behalf.

Sect. 20. "And that no manner of officer of the king's Exchequer shall take of any archbishop or bishop, or of any other persons, having charge with the collection and payment of the said pension or annual rent, any manner of reward, or thing for making their account or *quietus est*, in the same Exchequer, or for any manner of thing appertaining to the same, concerning the said pension and annual rent, upon pain of every officer, doing contrary to this act, to lose and forfeit his office, and make fine to the king at his will and pleasure.

Sect. 21. "And forasmuch as every incumbent of the dignities, benefices, and promotions spiritual aforementioned, shall be charged by this act to the payment of the tenth part of the value of their dignities, benefices, and promotions spiritual, without any deduction or allowance of such pension or pensions, wherewith some of them have been charged to pay their predecessors, during their lives, or to other persons to the use of such their predecessors, during their lives, it is therefore ordained and enacted by authority aforesaid, that it shall be lawful to every incumbent charged with any such pension, payable to any his predecessors, or to any to his use, to re-

tain and keep in his hand the tenth part of every such pension: and that every such incumbent and his sureties, shall from henceforth be acquitted and discharged of the said tenth part of every civil pension, by virtue and authority of this present act, any decree, ordinance, or assignment of any such ordinary, or any collateral writing, or surety made for such pension to any spiritual person or persons, or to any to their uses for term of their lives, in any wise notwithstanding. And that as well every incumbent, as such persons as stand bound for him, for payment of any such pensions, shall plead this act in every of the king's courts, for the clear extinguishment and discharge of the tenth part of every such pension.

Sect. 22. "And be it also ordained and enacted by authority aforesaid, that no pension shall hereafter be assigned by the ordinary, or by any other manner of agreement by collateral surety, or otherwise, upon any resignation of any dignity, benefice, or promotion spiritual, above the value of the third part of the dignity, benefice, or promotion spiritual resigned: and if any pension, amounting above the value of the third part of the dignity, benefice, or promotion spiritual heretofore resigned, be already limited and made sure, to any spiritual person or persons, by decree of the ordinary, or otherwise by any collateral surety, or hereafter shall happen to be assigned, and made sure to any person or persons spiritual, or to any other to their use, by decree of the ordinary, or by any other collateral surety upon any resignation thereof, yet nevertheless the incumbent charged with such pension, nor his sureties collateral, shall not be compelled to pay any more pension, than the value of the third part of his dignity, benefice, or promotion spiritual, so resigned, shall amount unto; but shall, by authority of this act, be clearly acquitted, and discharged of so much of the said pension, as shall amount above the value of the third part of the dignity or benefice resigned: any decree or assignment of the ordinary, or any collateral writing, or sureties heretofore made, or hereafter to be had, or made for the same, to the contrary thereof notwithstanding.

Sect. 23. "And forasmuch as divers abbots and priors been charged to pay great pensions to sundry their predecessors yet living, to the great decay of their hospitalities and house-keeping: be it enacted by authority aforesaid, that every such predecessor of such abbots or priors, having any pension made sure unto them, or to any to their use during their lives, amounting above the yearly value of forty pounds, shall from henceforth be defaulked and abated of the moiety and half deal of every such pension. And that every abbot and all other persons charged for the payment of such pension, above the said yearly value of forty pound, shall be clearly acquitted and discharged by authority of this act, of the moiety and half deal thereof for ever. Any decree or assignment thereof by the ordinary, or any writing or surety collateral, had or made for the surety thereof notwithstanding.

Sect. 24. "And forasmuch as the lord prior of Saint *Johns* of *Hierusalem* in *England*, and his brethren, be not specially named and expressed in this act, whereby ambiguity might arise, whether they should be comprised within the limits of this act: it is therefore for plain declaration thereof enacted by authority aforesaid, that every person and persons which after the said first day of January, shall happen to be nominated, elected, collated, or by any other means appointed to the dignity of the said prior of Saint *Johns* of *Hierusalem* in *England*, or to any commandry appertaining unto the same, shall before their actual and real entry into the same dignity or commandry, or meddling with the profits thereof, satisfy and pay to the use of the king's highness, his heirs and successors, the first fruits and pro-

fits thereof, for one whole year, or agree or compound for the same, at reasonable days in like manner and form, and upon like pains in every behalf, as archbishop and bishops, and other spiritual persons be bound to by virtue and authority of this act. And that also the prior of Saint *Johns* now being, and his successors, and every of his brethren having any commandry, and their successors, shall contribute and pay yearly to the king's highness, his heirs and successors, one yearly rent and pension, amounting to the tenth part of all their possessions and profits, as well spiritual as temporal: and shall be charged, rated, taxed, and set to the contribution and payment of the said tenth part. And that also the said tenth part shall be levied, collected, and paid in such like manner and form, to all intents and purposes, as the tenth part of other dignities and benefices spiritual shall be charged, taxed, set, levied, collected, and paid by authority of this act.

Sect. 25. "And forasmuch as in sundry and many cathedral churches, colleges, and hospitals of this realm, there is, and time out of mind hath been, certain ordinances instituted and made, whereby the dean, provost, master, or other chief governor of such churches, colleges, and hospitals, hath a certain part and portion of the possessions and profits belonging to such church, colleges, and hospitals, all only limited and belonging to their offices and dignities: and every prebendary, brother, vicar, fellow, petty canon, and other ministers spiritual in such churches, colleges, and hospitals, hath another portion, all only and distinctly limited, appertaining and belonging to their dignities and offices in such churches, hospitals, and colleges: it is therefore provided and ordained by authority aforesaid, that such person and persons, which, at any time after the said first day of January, shall be nominated, elected, presented, prefected, collated, or by other means appointed to be dean, provost, master, or other chief governor of such cathedral churches, colleges, or hospitals, shall be rated, compound and pay for their first fruits, but only after the rate of the yearly value of the possession and profits, limited and belonging to their office and dignity.

Sect. 26. "And that every other person and persons, that, after the said first day of January, shall be nominated, elected, presented, prefected, collated, or by any other means appointed to have any prebend, brothership, fellowship, or to be any vicar or petty canon, or to have any other dignity, or office spiritual, in any such cathedral churches, colleges or hospitals, shall be rated, compound and pay for their first fruits, after the rate of the yearly value of the possessions and profits, limited and belonging to their dignities and offices, in such churches, colleges and hospitals, and none otherwise: any thing in this act to the contrary hereof in any wise notwithstanding.

Sect. 27. "Provided always, that such person or persons, that, after the said first day of January, shall be presented and collated to any parsonage or vicarage, whereof the yearly value shall not exceed eight marks, shall not be compelled to pay any first fruits for any such parsonage, or vicarage, whereunto they shall be presented or collated, not being above the said yearly value of eight marks: except that the incumbent presented or collated to such parsonage or vicarage, whereof the yearly value shall not exceed eight marks, do live three years, next and immediately following after his institution, induction or collation, to such parsonage or vicarage, and if such incumbent do live after the said three years, then he or his executors or administrators shall pay at days to be limited after the said years upon sureties (as is aforesaid) the first fruits of every such parsonage and vicarage. And that in every obligation to be made by any incumbent of such parsonage

or vicarage and his sureties for payment of first fruits of such parsonage or vicarage, and there shall be contained a proviso, that if the said incumbent die within three years next after the date of the institution, induction, or collation of the said parsonage or vicarage, that then the obligation shall be void and of none effect. Any thing in this act to the contrary hereof notwithstanding.

Sect 28. "And over this where the clergy of the province of *Canterbury* in their convocation have granted unto the king's highness one hundred thousand pounds, and the clergy of the province of *York* eighteen thousand eight hundred and forty pound, ten pence, to be paid by even portions in five years, and that which could not be levied thereof in the same five years, to be paid in the sixth year, as by the tenor of their several grants thereof made in their several convocations more plainly appeareth: it may please the king's majesty of his excellent goodness, in consideration that the said yearly pension and annual rent shall be yearly from henceforth duly paid and satisfied to his highness, and to his heirs and successors, according to the tenor, form, purport, and effect of this present act: that it may be enacted by authority of this present parliament, that the clergy of the said province of *Canterbury*, and every of them, shall be discharged, and acquitted against our said sovereign lord, his heirs and successors, of, and for the twenty thousand pound, parcel of the said hundred thousand pounds, which should be paid in the fifth year of payment, limited by their grant: and that the clergy of the said province of *York* shall likewise be discharged and acquitted of and for all such sums of money, parcel of the said eighteen thousand eight hundred and forty pound, ten pence, which should be paid in the fifth year of payment, limited by their grant: any thing in their said several grants thereof made in any wise notwithstanding.

Sect. 29. "Provided always, that all the residue of sums of money, which be yet to be paid, and not released nor discharged by this act, shall be truly paid and satisfied to our said sovereign lord, his heirs or successors, according to the tenor, form, and effect of their said several grants.

Sect. 30. Provided also, that such fees, which any archbishop, bishop, abbot, prior, or other prelate of the church is bounden yearly to pay to any chancellor, master of the rolls, justices, sheriffs, or other officers or ministers of record, for temporal justice to be done or ministered within their diocess or jurisdiction, shall be allowed and deducted by the commissioners aforesaid, in and upon the valuation of the dignities, monasteries, priories, or churches chargeable with such fees: any thing in this act to the contrary hereof notwithstanding."

No. XXII.—P. 148.

27 Hen. VIII. chap. 20. A.D. 1535.

For Tithes to be paid throughout this Realm.

Sect. 1. "Forasmuch as divers numbers of evil disposed persons inhabited in sundry counties, cities, towns and places of this realm, having no respect to their duties to Almighty God, but against right, and good conscience, have attempted to subtract and withhold in some places the whole, and in some places great parts of their tithes and oblations, as well personal, as predial due unto God, and holy church, and pursuing such their detestable enormities, and injuries, have attempted in late time past to disobey, contemn and despise the process, laws and decrees of the ecclesiastical courts of this realm, in more temirous and large manner than before this time hath been seen. For reformation of which said injuries, and for unity and peace

to be preserved amongst the king's subjects of this realm, our sovereign lord the king, being supreme head on earth under God, of the church of *England*, willing the spiritual rights and duties of that church to be preserved, continued and maintained, hath ordained and enacted by authority of this present parliament, That every of his subjects of this realm of *England*, *Ireland*, *Wales*, and *Calais*, and marches of the same, according to the ecclesiastical laws and ordinances of his church of *England*, and after the laudable usages and customs of their parish, or other place where he dwelleth, or occupieth, shall yield and pay his tithes and offerings, and other duties of holy church, and that for such subtractions of any of the said tithes, offerings, or other duties, the parson, vicar, curate, or other party in that behalf grieved, may, by due process of the king's ecclesiastical laws of the church in *England*, convent the person or persons so offending before his ordinary, or other competent judge of this realm, having authority to hear and determine the right of tithes, and also to compel the same person or persons offending, to do and yield their said duties in that behalf. And in case the ordinary of the diocess, or his commissary, or the archdeacon or his official, or any other competent judge aforesaid, for any contempt, contumacy, disobedience, or other misdemeanour of the party defendant, make information and request to any of the king's most honourable council, or to the justices of the peace of the shire, where such offender dwelleth, to assist and aid the same ordinary, commissary, archdeacon, official, or judge, to order or reform any such person in any cause before rehearsed: that then two of the king's said honourable council, or such two justices of peace, whereof one to be of the *quorum*, to whom such information or request shall be made, shall have full power and authority by virtue of this act, to attach, or cause to be attached, the person or persons against whom such information or request shall be made, and to commit the same person or persons to ward, there to remain without bail and mainprise, till that he or they shall have found sufficient surety, to be bound by recognizance, or otherwise, before the king's said counsellor, or justice of peace, or any other like counsellor or justice of peace, to the use of our said sovereign lord the king, to give due obedience to the process, proceedings, decrees, and sentences of the ecclesiastical court of this realm, wherein such suit or matter for the premises shall depend or be. And that every of the king's said counsellors, or two justices of the peace, whereof one to be of the *quorum*, as is aforesaid, shall have full power and authority by virtue of this act, to take, receive, and record recognizances and obligations, in any of the causes above written.

Sect. 2. "Provided always, that this act, or any thing therein contained, shall not extend to any inhabitant of the city of *London*, for or concerning any manner of tithe, offering, or other ecclesiastical duty, grown and due, to be paid or yielden within the same city, because there is another order made for the payment of tithes, and other duties within the said city.

Sect. 3. "Provided also, that every person or persons, being party or parties to any such suit, shall and may make and have his and their lawful action, demand or prosecution, appeals, prohibitions, and all other their lawful defences and remedies in every such suit, according to the said ecclesiastical laws, and laws and statutes of this realm, in as ample and liberal manner and form as they or any of them might have had, if this act had never been made: any thing in this act above written notwithstanding.

Sect. 4. "Provided always, and be it enacted by authority aforesaid, that this act for recovering of tithes, nor any thing therein contained, shall take force and effect, but only until such time as the king's highness, and such

other thirty-two persons, which his highness shall name and appoint for the making and establishing of such laws, as his highness shall affirm and ratify, to be called the ecclesiastical laws of the church of *England*. And after the said laws so ratified and confirmed as is aforesaid, that then the said tithes to be paid to every ecclesiastical person, according to such laws, and none otherwise.

No. XXIII.—P. 149.

27 Hen. VIII. c. 28. A. D. 1535.

All Monasteries given to the King, which have not Lands above two hundred Pounds by the Year.

'Forasmuch as manifest, fynne, vicious, carnal, and abominable living 'is dayly used and committed commonly in such little and small abbeys, 'priories, and other religious houses of monks, canons, and nuns, where 'the congregation of such religious persons is under the number of twelve 'persons, whereby the governors of such religious houses, and their co-'vent, spoyle, destroye, consume, and utterly waste, as well their church-'es, monasteries, priories, principal houses, farms, granges, lands, tene-'ments, and hereditaments, as the ornaments of their churches, and their 'goods and chatells, to the high displeasure of Almighty God, slander of 'good religion, and to the great infamy of the king's highness and the 'realm, if redress should not be had thereof. And albeit that many conti-'nual visitations hath been heretofore had, by the space of two hundred 'years and more, for an honest and charitable reformation of such un-'thrifty, carnal, and abominable living, yet neverthelesse little or none 'amendment is hitherto had, but their vicious living shamelessly increaseth 'and augmenteth, and by a cursed custom so rooted and infected, that a 'great multitude of the religious persons in such small houses do rather 'choose to rove abroad in apostasy, than to conform themselves to the ob-'servation of good religion; so that without such small houses be utterly 'suppressed, and the religious persons therein committed to great and ho-'nourable monasteries of religion in this realm, where they may be com-'pelled to live religiously, for reformation of their lives, the same else be 'no redress nor reformation in that behalf. In consideration whereof, 'the king's most royal majesty, being supreme head on earth, under God, 'of the church of *England*, dayly studying and devysing the increase, ad-'vancement, and exaltacion of true doctrine and virtue in the said church, 'to the only glory and honour of God, and the total extirping and dystruc-'tion of vice and sin, having knowledge that the premisses be true, as 'well by the accompts of his late visitations, as by sundry credible infor-'mations, considering also that diverse and great solemn monasteries of 'this realm, wherein (thanks to God) religion is right well kept and ob-'served, be destitute of such full number of religious persons, as they 'ought and may keep, hath thought good, that a plain declaration should 'be made of the premises, as well to the lords spiritual and temporal, as 'to other his loving subjects the commons in this present parliament as-'sembled: whereupon the said lords and commons, by a great deliberation, 'finally be resolved, that it is and shall be much more to the pleasure of 'Almighty God, and for the honour of this his realm, that the possessions 'of such small religious houses, now being spent, spoiled, and wasted for 'increase and maintenance of sin, should be used and committed to better 'uses, and the unthrifty religious persons, so spending the same, to be 'compelled to reform their lives: And thereupon most humbly desire the

'king's highness that it may be enacted by authority of this present par-'liament,' that his majesty shall have and enjoy to him and his heirs for ever, all and singular such monasteries, priories, and other religious houses of monks, canons, and nuns, of what kinds of diversities of habits, rules, or order soever they be called or named, which have not in lands, tenements, rents, tithes, portions, and other hereditaments, above the clear yearly value of two hundred pounds. And in like manner shall have and enjoy all the sites and circuits of every such religious houses, and all and singular the manors, granges, meases, lands, tenements, rents, reversions, services, tithes, pensions, portions, churches, chapels, advowsons, patronages, annuities, rights, entries, conditions, and other hereditaments appertaining or belonging to every such monastery, priory, or other religious house, not having, as is aforesaid, above the said clear yearly value of two hundred pounds, in as large and ample manner as the abbots, priors, abbesses, prioresses, and other governors of such monasteries, priories, and other religious houses now have, or ought to have the same in the right of their houses. And that also his highness shall have to him and to his heirs all and singular such monasteries, abbies, and priories, which at any time within one year next before the making of this act hath been given and granted to his majesty by any abbot, prior, abbess, or prioress, under their covent seal, or that otherwise hath been suppressed or dissolved, and all and singular the manors, lands, tenements, rents, services, reversions, tithes, pensions, portions, churches, chapels, advowsons, patronages, rights, entries, conditions, and all other interests and hereditaments to the same monasteries, abbies, and priories, or to any of them appertaining or belonging; to have and to hold all and singular the premisses, with all their rights, profits, jurisdictions, and commodities, unto the king's majesty, and his heirs and assigns for ever, to do and use therewith his and their own wills, to the pleasure of Almighty God, and to the honour and profit of this realm.

II. And it is ordained and enacted by the authority aforesaid, that all and every person and persons, and bodies politick, which now have, or hereafter shall have, any letters patents of the king's highness, of any of the sites, circuits, manors, lands, tenements, rents, reversions, services, tithes, pensions, portions, churches, chapels, advowsons, patronages, tithes, entries, conditions, interests, or other hereditaments, which appertained to any monasteries, abbies, or priories, heretofore given or granted to the king's highness, or otherwise suppressed or dissolved, or which appertaineth to any of the monasteries, abbies, priories, or other religious houses, that shall be suppressed or dissolved by the authority of this act, shall have and enjoy the said sites, circuits, manors, lands, tenements, rents, reversions, services, tithes, pensions, portions, churches, chapels, advowsons, patronages, tithes, entries, conditions, interests, and all other hereditaments, contained and specified in their letters patents now being thereof made, and to be contained and expressed in any letters patents hereafter to be made, according to the tenour, purport, and effect of any such letters patents; and shall also have all such actions, suits, entries, and remedies, to all intents and purposes, for any thing and things contained in every such letters patents now made, or to be contained in any such letters hereafter to be made, in like manner, form, and conditions, as the abbots, priors, abbesses, prioresses, and other chief governors of any religious houses which had the same, might or ought to have had, if they had not been suppressed or dissolved;

III. Saving to every person and persons, and bodies politick, their heirs and successors, (other than the abbots, priors, abbesses, prioresses, and

other chief governors of the said religious houses specified in this act, and the covents of the same, and their successors, and such as pretend to be founders, patrons, or donors of such religious houses, of any lands, tenements, or hereditaments, belonging to the same, and their heirs and successors,) all such right, title, interest, possessions, leases for years, rents, services, annuities, commodities, fees, offices, liberties, and livings, pensions, portions, corrodies, synodies, proxies, and all other profits as they or any of them hath, ought, or might have had in or to any of the said monasteries, abbies, priories, or other religious houses, or in or to any manors, lands, tenements, rents, reversions, tithes, pensions, portions, or other hereditaments appertaining or belonging, or that appertained to any of the said monasteries, priories, or other religious houses, as if the same monasteries, priories, or other religious houses had not been suppressed by this act, but had continued in their essential bodies and states that they now be, or were in.

IV. Provided always, and be it enacted, that forasmuch as divers of the chief governors of such religious houses, determining the utter spoil and destruction of their houses, and dreading the suppressing thereof, for the maintenance of their detestable lives, have lately fraudulently and craftily made feoffments, estates, gifts, grants, and leases, under the covent seals, or suffered recoveries of their manors, lands, tenements, and hereditaments, in fee-simple, fee-tail, for term of life or lives, or for years, or charged the same with rents, or corrodies, to the great decay and diminution of the houses; that all such crafty and fraudulent recoveries, feoffments, estates, gifts, grants, and leases, and every of them, made by any of the said chief governors of such religious houses, under their covent seals, within one year next before the making of this act, shall be utterly void and of none effect: Provided always, that such person and persons as have leases for term of life, or years, whereupon is reserved the old rents and ferms accustomed, and such as have any offices, fees, or corrodies, that have been accustomed or used in such religious houses, and have bought any livery or living in any such houses, shall have and enjoy their said leases, offices, fees, corrodies, liberties, liveries, and livings, as if this act had never been made.

V. And it is further enacted by authority aforesaid, that the king's highness shall have and enjoy to his own proper use, all such ornaments, jewels, goods, chattels, and debts, which appertained or belonged to any of the chief governors of the said monasteries, or religious houses, in the right of their said monasteries or houses, at the first day of March in the year of our Lord God 1535, or any time sithen whensoever, and to whose possession soever they shall come, or be found, except only such beasts, grain, and woods, and such other like chattel and revenues as have been sold before the said first day of March, or sithen, for the necessary or reasonable expences or charges of any of the said monasteries or houses.

Provided always, that such of the said chief governors which have been elect, or made abbots, priors, abbesses, or prioresses, of any of the said religious houses sithen the first day of January which was in the year of our Lord God 1534, and by reason thereof be bounden to pay the first-fruits to the king's highness, at days to come, limited by their bonds made for the same, that in every such case such chief governors, and their sureties, or any of them, shall be clearly discharged by authority of this act, against the king's highness, and all other persons, for the payment of such sums of money as they stand bounden to pay for the said first-fruits, or for any part thereof: And forasmuch as the clear yearly value of all the said monasteries, priories, and other religious houses in this realm, is certified into

the king's exchequer, amongst the books of the yearly valuation of all the spiritual possessions of this realm, amongst which shall and may appear the certainty and number of such small and little religious houses, as have not in lands, tenements, rents, tithes, portions, and other hereditaments, above the said clear yearly value of two hundred pounds:

VI. Be it therefore enacted by authority aforesaid, that the king's highness shall have and enjoy according to this act, the actual and real possession of all and singular such monasteries, priories, and other religious houses, as shall appear by the said certificate remaining in the king's exchequer, not to have in lands, tenements, rents, tithes, portions, and other hereditaments, above the said clear yearly value of two hundred pounds, so that his highness may lawfully give, grant, and dispose them, or any of them, at his will and pleasure, to the honour of God, and the wealth of this realm, without farther inquisitions or offices to be had or found for the same.

In consideration of which premises to be had to his highness, and to his heirs, as is aforesaid, his majesty is pleased and contented, of his most excellent charity, to provide to every chief head and governor of every such religious house, during their lives, such yearly pensions and benefices as for their degrees and qualities shall be reasonable and convenient, wherein his highness will have most tender respect to such of the said chief governors as well and truly preserve and keep the goods and ornaments of their houses, to the use of his grace, without spoil, waste, or embezzling the same; and also his majesty will ordain and provide, that the covents of every such religious house shall have their capacities, if they will, to live honestly and virtuously abroad, and some convenient charity disposed to them towards their living, or else shall be committed to such honourable great monasteries of this realm wherein good religion is observed, as shall be limited by his highness, there to live religiously during their lives; and it is ordained by the authority aforesaid, that the chief governors and covents of such honourable great monasteries shall take and accept into their houses, from time to time, such number of the persons of the said covents as shall be assigned and appointed by the king's highness, and keep them religiously, during their lives, within their said monasteries, in like manner and form as the covents of such great monasteries be ordered and kept.

Provided always, that all archbishops, bishops, and other persons which be or shall be chargeable to and for the collection of the tenths granted, and going out of the spiritual possessions of this realm, shall be discharged and acquitted of and for such parts and portions of the said tenths wherewith the said houses of religion, suppressed and dissolved by this act, were charged or chargeable to the king's highness, except of such sums of money thereof, as they, or any of them have, or shall have received for the said tenths, of the chief governors of such religious houses: Provided also, that where the clergy of the province of *Canterbury* stood, and be indebted to the king's highness in great sums of money, remaining yet unpaid, of the rest of a hundred thousand pounds granted and given to his grace in their convocation, towards the payment whereof the said religious houses should have been contributory if they had not been suppressed by this act; and also some of the governors of the said religious houses have been collectors for levying of the said debt, and have received thereof great sums of money yet remaining in their hands; the king's most royal majesty is pleased and contented to deduct, abate, release, and defalk, to the said clergy, of the said rest yet unpaid, as well such sums of money as any the chief governors of such religious houses hath received, and not paid, as so much money as

every of the said religious houses, suppressed by this act, were rated and taxed to pay in any one year, to and for the payment of the said hundred thousand pounds; and also the king's majesty is pleased and contented, that it be enacted by authority aforesaid, that his highness shall satisfy, content, and pay, all and singular such just and true debts which be owing to any person or persons by the chief governors of any the said religious houses, in as large and ample manner as the said chief governors should or ought to have done if this act had never been made: Provided always, that the king's highness, at any time after the making of this act, may at his pleasure ordain and declare, by his letters patents under his great seal, that such of the said religious houses which his highness shall not be disposed to have suppressed nor dissolved by authority of this act, shall still continue, remain, and be in the same body corporate, and in the said essential estate, quality, and condition, as well in possessions as otherwise, as they were afore the making of this act, without any suppression or dissolution thereof, or of any part of the same, by the authority of this act; and that every such ordinance and declaration, so to be made by the king's highness, shall be good and effectual to the chief governors of such religious houses which his majesty will not have suppressed, and to their successors, according to the tenors and purports of the letters patents thereof to be made, any thing or things contained in this act to the contrary hereof notwithstanding: Provided also, that where the clergy of the province of *York* stood, and be indebted to the king's highness in great sums of money yet unpaid, of the rest of such sums of money which was granted by them to his majesty in their convocation, towards the payment whereof the religious houses that shall be suppressed and dissolved by this act, being within the same province, should have been contributory if they had not been dissolved, and also some of the governors of the said religious houses within the said province, that shall be suppressed by this act, have been collectors for levying of part of the said sums of money granted to the king's highness, as is aforesaid, and have certain sums thereof in their hands yet unpaid, the king's majesty is pleased and contented to deduct, abate, release, and defalk to the said clergy of the said province of *York*, of the rest of their said debt yet unpaid, as well such of the said sums of money, as any chief governors of any religious houses within the same province, that shall be suppressed by this act, hath been collected, and not paid, as so much money as every of the said religious houses, suppressed by this act, were rated and taxed to pay in any one year, towards the payment of the said sums of money granted to the king's highness.

VII. Provided always, that this act, or any thing or things therein contained, shall not extend, nor be prejudicial to any abbots or priors of any monasteries or priories, being certified into the king's exchequer, to have in possessions and profits spiritual and temporal, above the clear yearly value of two hundred pounds, for or concerning such cells of religious houses, appertaining or belonging to their monasteries or priories, in which cells the priors, or other chief governors thereof, be under the obedience of the abbots or priors to whom such cells belong, as the monks or canons of the covent of their monasteries or priories, and cannot sue, nor be sued, by the laws of this realm, in or by their own proper names, for the possession, or other things appertaining to such cells whereof they be priors or governors, but must sue and be sued in and by the names of the abbots or priors to whom they be obediencers, and to whom such cells belong; and also be priors or governors dative, and removable from time to time, and accountants of the profits of such cells, at the only pleasure and will of the abbots

or priors to whom such cells belong; but that every such cell shall be and remain undissolved in the same estate, quality, and condition, as if this act had never been made; any thing in this act to the contrary hereof notwithstanding.

VIII. Saving always, and reserving unto every person and persons, being founders, patrons, or donors of any abbies, priories, or other religious houses, that shall be suppressed by this act, their heirs and successors, all such right, title, interest, possession, rents, annuities, fees, offices, leases, commons, and all other profits whatsoever, which any of them have, or should have had, without fraud or covin, by any manner of means, otherwise than by reason or occasion of the dissolution of the said abbies, priories, or other religious houses, in, to, or upon any the said abbies, priories, or other religious houses, whereof they be founders, patrons, or donors, or in, to, or upon any the lands, tenements, or other hereditaments, appertaining or belonging to the same, in like manner, form, and condition as other persons and bodies politick be saved by this act, as is afore rehearsed, and as if the said abbies, priories, or other religious houses, had not been suppressed and dissolved by this act, but had continued still in their essential bodies and estates as they be now in, any thing in this act to the contrary hereof notwithstanding.

No. XXIV.—P. 149.

List of Abbies, Monasteries, &c. which on the general Survey taken 26 Hen. VIII. *were returned to be* 200*l. Value and upwards,* per Ann. *and consequently were dissolved by Stat.* 31 H. VIII. 13. *and thereby discharged of the Payment of Tithes; with what order they were of, and the Times of their Foundations.*

Monasteries.	*Order.*	*Founded.*	*l.*	*s.*	*d.*
		BERKS.			
Reading.	Ben.	*Temp.* H. I.	1938	14	03
Buslesham *Ab.*	*C.* Aust.	13 Edw. III.	285	00	00
Abbington *Ab.*	Ben.	*An.* 720.	1876	10	09
		BEDFORD.			
Newnham *Pr.*	*C.* Aust.	*T.* Hen. I.	293	15	11
Elmeston *Ab.*	Ben.	*T.* W. Conq.	284	12	11
Wardon *Ab.*	Cist.	*An.* 1139.	389	16	06
Chicksand *Pr.*	*Wh. C.* Gilb.	*T.* W. Rufus.	212	03	05
Dunstable *Ab.*	*C.* Aust.	*T.* Hen. I.	344	13	03
Wooburn *Ab.*	Cist.	*T.* John.	391	18	02
		BUCKS.			
Ashrug *Coll.*	*C.* Aust.	*T.* Edw. I.	416	16	04
Notely *Ab.*	*C.* Aust.	*An.* 1112.	437	06	08
Missenden *Ab.*	Ben.	*An.* 1293.	261	14	06
		CANTABR.			
Thorney *Ab.*	Ben.	*An.* 972.	411	12	1[illegible]
Barewel *Pr.*	*C.* Aust.	*An.* 1092.	256	11	10
		CESTR.			
St. Werburge *Ab.*	Ben.	*An.* 1095.	1003	05	11
Cumbermeer *Ab.*	Cist.	*An.* 1134.	225	09	07
		CORNUB.			
Bodmin *Pr.*	*C.* Aust.	*An.* 936.	270	00	11
Launceston *Ab.*	*C.* Aust.	*T.* Will. Conq.	354	00	11

Monasteries.	*Order.*	*Founded.*	*l.*	*s.*	*d.*
St. Germans *Ab.*	*C.* Aust.	*T. K.* Ethelstane.	243	08	00
		CUMBR.			
Carlisle *Pr.*	*C.* Aust.	*T.* Will. Rufus.	418	03	04
Holmcoltrom *Ab.*	Cist.	*An.* 1135.	427	19	03
		DERB.			
Darley *Ab.*	*C.* Aust.	*T.* Hen. II.	258	14	05
		DEVON.			
Ford. *Ab.*	Cist.	*An.* 1133.	374	10	06
Newnham *Ab.*	Cist.	*Circ. An.* 1246.	227	07	08
Dinkeswell *Ab.*	Cist.	*An.* 1201.	294	18	06
Hertland *Ab.*	*C.* Aust.	*T.* Hen. II.	306	03	02
Torre *Ab.*	Præm.	*T.* Richard I.	396	00	11
Buckfast *Ab.*	Cist.	*T.* Hen. II.	466	11	02
Plimpton *Ab.*	Cist.	*T.* Edw. II.	241	17	09
Tavestock *Ab.*	Ben.	*An.* 961.	902	05	07
Exon *Pr.*	Clun.	*T.* Hen. I.	502	12	09
		DORSET.			
Abbotsbury.	Ben.	*Circ. An.* 1016.	390	19	02
Middleton *Ab.*	Ben.	*by* K. Ethelstane.	538	13	11
Tarrent *Ab.*	Cist.	*by* Hen. III.	214	07	09
Shafton *Ab.*	Ben.	*An* 941.	1166	08	09
Cerne *Ab.*	Ben.	*T. K.* Edgar.	515	17	10
Sherburn *Ab.*	Ben.	*Circ. An.* 370.	682	14	07
		DUNELM.			
St. Cuthbert *Ab.*	Ben.	*Circ. An.* 842	1366	10	09
Tinmouth *Pr.*	Ben.		397	11	05
		ESSEX.			
Berking *Ab.*	Ben.	*An.* 680.	862	12	05
Stratford Langthorn *Ab.*	Cist.	*An.* 1135.	511	16	03
Waltham *Ab.*	*C.* Aust.	*Circ. An.* 1060.	900	04	03
Walden *Ab.*	Ben.	*An.* 1136.	372	18	01
St. Oswith *Ab.*	*C.* Aust.	*An.* 1120.	677	01	02
Colchester *Ab.*	*C.* Aust.	*T.* Hen. I.	523	17	09
		GLOUCESTER.			
Bristol *Ab.*	*C.* Aust.	*T.* Hen. I.	670	13	11
Hayles *Ab.*	Cist.	*An.* 1246.	357	07	08
Winchcomb *Ab.*	Ben.	*An.* 787.	759	11	09
Tewkesbury *Ab.*	Ben.	*An.* 715.	1598	01	05
Cirencester *Ab.*	*C.* Aust.	*T.* Hen. I.	1051	07	01
Kingswood *Ab.*	Cist.	*An.* 1139.	244	11	02
Gloucester *Ab.*	Ben.	*An.* 680.	1946	05	09
Lanthony *Pr.*	*C.* Aust.	*An.* 1136.	648	19	11
		HANTS.			
St. Swithins Winton *Ab.*	Ben.	*An.* 634.	1507	17	02
Hyde *Ab.*	Ben.	*by K.* Alfred	865	18	00
Wherwell *Ab.*	Ben.	*T. K.* Edgar.	339	08	07
Romsey *Mon.*	Ben.	*An.* 907.	393	10	10
Twinham *Pr.*	*C.* Aust.	*Ante* 1042.	312	07	00

Monasteries.	*Order.*	*Founded.*	*l.*	*s.*	*d.*
Belloloco *Ab.*	Cist.	*An.* 1024.	326	13	02
Southwick *Pr.*	*C.* Aust.	*T.* Hen. I.	257	04	04
Tichfield *Ab.*	Præm.	*T.* Hen. III.	249	16	01
		HERTFORD.			
St. Albans *Ab.*	Ben.	*An.* 755.	2102	07	01
		HUNTS.			
St. Neots *Ab.*	Ben.	*Circ. T.* Hen. I.	241	11	04
Ramsey *Ab.*	Ben.	*An.* 969.	1716	12	08
		KANC.			
St. Austin's *prope* Cant. *Ab.*	Ben.	*An.* 605.	1413	04	11
Ledis *Pr.*	*C.* Aust.	*An.* 1119.	362	07	07
Feversham *Ab.*	Clun.	*An.* 1147.	286	12	06
Boxley *Ab.*	Cist.	*An.* 1144.	204	04	11
Roffen *Ab.*	Ben.	*An.* 600.	486	11	05
Malling *Ab.*	Ben.	*by K.* Edmund.			
Dertford *Ab.*	*C.* Aust.	46 Edw. III. *per ipsum R.*	380	00	00
		LANC.			
Whalley *Ab.*	Cist.	*An.* 1172.	321	09	01
		LEIC.			
Leiceister *Ab.*	*C.* Aust.	*An.* 1143.	951	14	05
Croxden *Ab.*	Præm.	*Circ. T.* Ric. I.	385	00	10
Launda *Ab.*	*C.* Aust.	*T.* Will. Rufus.	399	03	08
		LINCOLN.			
Lincoln *St.* Catharine *Pr.*	Gilb.	*T.* Hen. II.	202	05	00
Kirksteed *Ab.*	Cist.	*An.* 1139.	286	02	07
Revesley *Ab.*	Cist.	*An.* 1142.	287	02	04
Thornton *Ab.*	*C.* Aust.	*An.* 1139.	594	17	10
Bardney *Ab.*	Ben.	*An.* 712.	366	06	01
Croyland *Ab.*	Ben.	*An.* 716.	1803	15	10
Spalding *Ab.*	Ben.	*An.* 1052.	761	10	11
Sempringham *Ab.*	Gilb.	*An.* 1148.	317	04	01
Epworth *Mon.*	Carth.	10 Ric. II.	237	15	02
		LOND. and *MIDD.*			
St. John Jerusalem *Pr.*		*An.* 1100.	2585	14	08
St. Bartholo. Smithfield.	*C.* Aust.	*An.* 1102.	653	15	00
St. Mary Bishopsgate *Pr.*		*An.* 1187.	478	06	06
Clerkenwell *Pr.*	Ben.	*T. K.* Steph.	262	19	00
London *Minors.*	Ben.	*T.* Edw. I.	318	08	05
Westminster *Ab.*	Ben.	*T. K.* Edgar.	3471	00	02
Sion *Ab.*	*C.* Aust.	*by* Hen. V.	1731	08	04
London, *a House of.*	Carth.	*T.* Edw. III.	642	00	08
St. Clare *without* Aldgate *Mon.*		*An.* 1292.	418	08	05
St. Mary *Charter House.*	Carth.	*An.* 1379.	726	02	07

Monasteries.	*Order.*	*Founded.*	*l.*	*s.*	*d.*
St. John Holiwel.	Mon. Nig.	*An.* 1318.	347	01	03
St. Mary East Smithfield *Ab.*	Cist.	34 Edw. III.	602	11	10
		NORTHFOL.			
Thetford *Ab.*	Clun.	*An.* 1103.	312	14	04
Wymundham *Ab.*	Ben.	*An.* 1139.	211	16	06
Hulmo *Ab.*	Ben.	*by K.* Canutus.	583	17	00
Westderham *Ab.*	Præm.	*T.* Hen. II.	228	00	00
Walsingham *Ab.*	*C.* Aust.	*c. T. K.* Steph.	391	11	05
Castle-Acre *Ab.*	Clun.	*An.* 1090.	306	11	04
West-Acre *Ab.*	Clun.	*T.* W. Rufus.	260	13	07
		NORTHTON.			
Burgi *St.* Petri *Ab.*	Ben.	*by* Rosere R. Merc.	1721	14	00
Pipewel *Ab.*	Cist.	*An.* 1143.	286	11	08
St. Andrews *Pr.*	Clun.	*An.* 1067.	263	07	01
Sulby *Ab.*	Præm.	*T. K.* Steph.	258	08	05
		NOTTS.			
Lenton *Pr.*	Clun.	*T.* Hen. I.	329	05	10
Thurgarton *Pr.*	*C.* Aust.	*T.* Hen. I.	259	09	04
Welbeck *Ab.*	*C.* Aust.	*T. K.* Steph.	249	06	03
Warsop *Pr.*	*C.* Aust.		239	10	05
Bella Valla *Pr.*	Carth.	*c.* 16 Edw. III.	227	08	00
Newsteed *Pr.*	*C.* Aust.	*T.* Edw. III.	219	18	08
The Two last are under Value in Mr. *Dugdale,* but thus *per Speed.*					
		NORTHUMBR.			
Tinmouth *Nunnery, a cell to St.* Albans.			511	04	01
		OXON.			
Godstow *Ab.*	Ben.	*T. K.* Steph.	274	05	10
Eynesham *Ab.*	Ben.	*by K.* Ethelred.	441	12	02
Osney *Ab.*	*C.* Aust.	*T.* Hen. I.	654	10	02
Thama *Ab.*	Cist.	*T.* Hen. I.	256	13	11
Oxford *Pr. per* Speed, *fund. ante Conq.*			224	04	08
Dorchester *per eund. Ab.*	*C.* Aust.	*An.* 635.	219	12	00
		SALOP.			
Haghmond *Ab.*	*C.* Aust.	*An.* 1100.	259	13	07
Lilleshull *Ab.*	*C.* Aust.	*per* A. d'Elfle-da, R. Merciæ	229	03	01
Wigmore *Ab.*	*C.* Aust.	*An.* 1172, *per Speed*	267	02	10
Wenlock *Pr.*	Clun.	*An.* 1181, *vel antea*	401	05	07
Salop *Ab.*	*C.* Aust.	*An.* 1081, *per Speed*	615	04	03
Hales Owen *Ab.*	Præm.	*T. K.* John.	337	15	06
		SOMERSET.			
Glassenbury *Ab.*	Ben.	*Circ. An.* 300.	3311	07	04
Brewton *Ab.*	*C.* Aust.	*Circ. T.* Will. Conq.	439	06	08
Henton *Pr.*	Carth.	*T.* Hen. III.	248	19	02
Witham *Pr.*	Carth.	*by* Hen. II.	215	15	00
Taunton *Pr.*	*C.* Aust.	*T.* Hen. I.	617	02	03
Bathon *Ab.*	Ben.	*T.* Hen. III.	286	08	10
Keynesham *Ab.*	*C.* Aust.	*T.* Hen. I.	419	14	03

Monasteries.	*Order.*	*Founded.*	*l.*	*s.*	*d.*
Michelney *Ab.*	Ben.	*An.* 470.	447	4	11
Buckland *Pr.*	Cist.	*T.* Edw. I.	223	7	4
		STAFF.			
Dela Cres *Ab.*	Cist.	*An.* 1153.	227	5	0
Burton *super* Trent *Ab.*	Ben.	*T. K.* Eadred.	267	14	8
Croxden *Ab.*					
		SUFFOLK.			
St. Edmondsbury *Ab.*	Ben.	*An.* 1020.	1659	13	11
Butley *Ab.*	*C.* Aust.	*An.* 1171.	318	17	2
Sibeton *Ab.*	Cist.	*An.* 1150.	250	15	7
Ixworth *Pr.*	*C.* Aust.	*T.* Will. Conq.	280	9	5
		SURREY.			
Merton *Pr.*	*C.* Aust.	*An.* 1414.	957	19	5
Shene *Pr.*	Carth.	*An.* 1414.	777	12	0
Chertsey *Ab.*	Ben.	*An.* 666.	659	11	8
Newark *Pr.*			258	11	11
St. Mary Overs *Ab.*	*C.* Aust.	7 Hen. I.	625	6	6
Bermundsey *Ab.*	*C.* Aust.	7 Hen. I.	474	14	4
		SUSSEX.			
Lewis *Ab.*	Clun.	*T.* Will, Rufus.	920	4	6
Roberts Bridge *Ab.*	Cist.	*T.* Hen. II.	248	10	6
Battaile *Ab.*	Bl. Monks.	*An.* 1066.	987	0	11
		WARW.			
Combe *Ab.*	Cist.	*T. K.* Steph.	311	15	1
Kenelw. *Ab.*	*C.* Aust.	*T.* Hen. I.	538	19	0
Meryval *Ab.*	Cist.	*An.* 1148.	254	1	8
Nuneaton *Mon.*	Ben.	*T.* Hen. II.	253	14	5
		WILTS.			
Malmsbury *Ab.*	Ben.	*Circ. An.* 670.	803	7	7
Bradenstock *Pr.*	*C.* Aust.	*T.* Will. Conq.	212	19	3
Edington *Pr.*	*C.* Aust.	*An.* 1352.	442	19	7
Ambresbury *Ab.*	Ben.	*An.* 1177.	404	15	2
Wilton *Ab.*	Ben.	*T. K.* Ethelwolf.	601	1	1
Faireley, *a cell to* Lewis.	Clun.	*An.* 1125.	217	0	4
Laycock *Ab.*	*C.* Aust.	*An.* 1232. *per* Speed.	203	12	3
		WIGORN.			
Malverne *Ab.*	Ben.	*An.* 1083.	308	1	3
Evesham *Ab.*	Ben.	*T. K.* Offa.	1183	12	9
Pershore *Ab.*	Cist.		643	4	5
Hales Owen *Ab.*	Præm.	*T. K.* John.	282	13	4
Bordesly *Ab.*	Cist.	*An.* 1138.	388	1	1
		EBORUM.			
St. Mary Ebor. *Ab.*	Ben.	2 Will. Rufus.	1550	7	0
Selby *Ab.*	Ben.	*T.* Will. Conq.	720	12	10
Kirkstal *Ab.*	Cist.	*An.* 1147.	329	2	11
De Rupe *Ab.*	Cist.	*An.* 1147.	224	2	5
Monks Burton *Ab.*	Clun.	*Circ. An.* 1186.	239	3	6
Nostel *Ab.*	*C.* Aust.	*T.* Hen. I.	492	18	2

Monasteries.	*Order.*	*Founded.*	*l.*	*s.*	*d.*
Pomfrait *Ab.*	Clun.	*T.* Will. Conq.	237	14	8
Gisbourn *Ab.*	*C.* Aust.	*T. K.* Steph.	628	3	4
Whitby *Ab.*	Ben.	*T.* Will. Conq.	437	2	9
Montegratiæ *Ab.*	Carth.	*Circ. An.* 1396.	323	2	10
Newburge *Pr.*	*C.* Aust.	*An.* 1145.	367	8	3
Belland *Ab.*	Cist.	*An.* 1134.	238	9	1
Kirham *Ab.*	*C.* Aust.	*T.* Hen. I.	269	5	9
Melsa *Ab.*	Cist.	*An.* 1136.	299	6	4
Brilington.	*C.* Aust.	*T.* Hen. I.	547	6	11
Walton *Ab.*	Gilb.	*T. K.* Steph.	360	16	10
Bolton in Craven *Pr.*	*C.* Aust.	*T.* Hen. I.	212	3	4
Rival *Ab.*	Cist.	*An.* 1132.	278	10	2
Jerval *Ab.*	Cist.	*T. K.* Steph.	234	18	5
Furnes *Ab.*	Cist.	*An.* 1127.	805	16	5
De Fontibus.	Cist.	*An.* 1132.	998	6	8
Warter *Pr.*	*C.* Aust.	*T.* Hen. I.	221	3	10
Richal, *per* Speed.			351	14	6
Old Maulton *Ab.*		*T. K.* Steph. *per* Speed.	257	7	0
St. Michael *near* Hull.	Carth.	*An.* 1377.	231	17	3
		WALLIA.			
Valle de Sancta Cruce *Com.* Denbeigh.	Cist.	*T.* Edw. I.	214	3	5
Strata Florida Cardiganshire.	Cist. *or* Clun.	*T.* Will. Conq.	1226	6	0

No. XXV.—P. 149.

31 H. VIII. c. 13. A. D. 1539.

An Act for Dissolution of Monasteries and Abbies.

'Whereas divers and sundry abbots, priors, abbesses, prioresses, and other 'ecclesiastical governors and governesses of divers monasteries, abbathies, 'priories, nunneries, colleges, hospitals, houses of friers, and other religious 'and ecclesiastical houses and places within this our sovereign lord the king's 'realm of *England* and *Wales*, of their own free and voluntary minds, good 'wills, and assent, without constraint, coaction, or compulsion of any man-'ner of person or persons, sithen the fourth day of *February*, the twenty-'seventh year of the reign of our now most dread sovereign lord, by the 'due order and course of the common laws of this his realm of *England*, 'and by their sufficient writings of record under their covent and common 'seals, have severally given, granted, and by the same their writings severally 'confirmed all their said monasteries, abbathies, priories, nunneries, colleges, 'hospitals, houses of friers, and other religious and ecclesiastical houses and 'places, and all their sites, circuits, and precincts of the same, and all and 'singular their manors, lordships, granges, meases, lands, tenements, mea-'dows, pastures, rents, reversions, services, woods, tithes, pensions, por-'tions, churches, chapels, advowsons, patronages, annuities, rights, entries, 'conditions, commons, leets, courts, liberties, privileges, and franchises, ap-'pertaining, or in anywise belonging to any such monastery, abbathy, priory, 'nunnery, college, hospital, house of friers, and other religious and ecclesi-'astical houses and places, or to any of them, by whatsoever name or cor-'poration they or any of them were then named or called, and of what

'order, habit, religion, or other kind or quality soever they or any of them 'were then reputed, known, or taken; to have and to hold all the said mo- 'nasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, 'and other religious and ecclesiastical houses or places, sites, circuits, pre- 'cincts, manors, lands, tenements, meadows, pastures, rents, reversions, 'services, and all other the premises, to our said sovereign lord, his heirs 'and successors for ever, and the same their said monasteries, abbathies, pri- 'ories, nunneries, colleges, hospitals, houses of friers, and other religious and 'ecclesiastical houses and places, sites, circuits, precincts, manors, lordships, 'granges, meases, lands, tenements, meadows, pastures, rents, reversions, 'services, and other the premises voluntarily, as is aforesaid, have renounced, 'left, and forsaken, and every of them hath renounced, left, and forsaken.'

II. Be it therefore enacted by the king our sovereign lord, and the lords spiritual and temporal, and the commons, in this present parliament assembled, and by authority of the same, that the king our sovereign lord shall have, hold, possess, and enjoy to him, his heirs and successors for ever, all and singular such late monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, of what kinds, natures, qualities, or diversities of habits, rules, professions, or orders, they or any of them were named, known, or called, which sithr the said fourth day of *February*, the twenty-seventh year of the reign of our said sovereign lord, have been dissolved, suppressed, renounced, relinquished, forfeited, given up, or by any other mean come to his highness, and by the same authority, and in like manner shall have, hold, possess, and enjoy all the sites, circuits, precincts, manors, lordships, granges, meases, lands, tenements, meadows, pastures, rents, reversions, services, woods, tithes, pensions, portions, parsonages appropriated, vicarages, churches, chapels, advowsons, nominations, patronages, annuities, rights, interests, entries, conditions, commons, leets, courts, liberties, privileges, franchises, and other whatsoever hereditaments, which appertained or belonged to the said late monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, or to any of them, in as large and ample manner and form as the late abbots, priors, abbesses, prioresses, and other ecclesiastical governors and governesses of such late monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, had, held, or occupied, or of right ought to have had, holden, or occupied in the right of their said late monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, or other religious and ecclesiastical houses and places, at the time of the said dissolution, suppression, renouncing, relinquishing, forfeiting, giving up, or by any other manner of mean coming of the same to the king's highness sithen the fourth day of *February* above specified.

III. And it is further enacted by the authority aforesaid, that not only all the said late monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, sites, circuits, precincts, manors, lordships, granges, meases, lands, tenements, meadows, pastures, rents, reversions, services, and all other the premises, forthwith, immediately, and presently, but also all other monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and all other religious and ecclesiastical houses and places, which hereafter shall happen to be dissolved, suppressed, renounced, relinquished, forfeited, given up, or by any other mean come to the king's highness; and also all the sites, circuits, precincts, manors, lordships, granges, meases, lands, tene-

ments, meadows, pastures, rents, reversions, services, woods, tithes, pensions, portions, parsonages appropriate, vicarages, churches, chapels, advowsons, nominations, patronages, annuities, rights, interests, entries, conditions, commons, leets, courts, liberties, privileges, franchises, and other hereditaments whatsoever they be, belonging or appertaining to the same, or any of them, whensoever, and as soon as they shall be dissolved, suppressed, renounced, relinquished, forfeited, given up, or by any other mean come unto the king's highness, shall be vested, deemed, and adjudged by authority of this present parliament, in the very actual and real seisin and possession of the king our sovereign lord, his heirs and successors, for ever, in the state and condition as they now be, and as though all the said late monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and all other religious and ecclesiastical houses and places so dissolved, suppressed, renounced, relinquished, forfeited, given up, or come unto the king's highness, as is aforesaid, as also the said monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, which hereafter shall happen to be dissolved, suppressed, renounced, relinquished, forfeited, given up, or come unto the king's highness, sites, circuits, precincts, manors, lordships, granges, lands, tenements, and other the premises, whatsoever they be, and every of them, were in this present act specially and particularly rehearsed, named, and expressed by express words, names, titles, and faculties, and in their natures, kinds, and qualities.

XIV. Provided also, and be it further enacted by the authority aforesaid, that all and every person and persons, their heirs and assigns, which sithen the said fourth day of *February*, by licence, pardon, confirmation, release, assent, or consent, of our said sovereign lord the king, under his great seal heretofore given, had, or made, or hereafter to be had or made, have obtained or purchased by indenture, fine, feoffment, recovery, or otherwise, of the said late abbots, priors, abbesses, prioresses, or other governors or governesses of any such monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, or other religious and ecclesiastical houses or places, any monasteries, priories, colleges, hospitals, manors, lands, tenements, meadows, pastures, woods, churches, chapels, parsonages, tithes, pensions, portions, or other hereditaments, shall have and enjoy the same, according to such writings and assurances as been thereof before the first day of this present parliament, or hereafter shall be, had or made:

XV. Saving to all and every person and persons, and bodies politick, their heirs and successors, and the heirs and successors of every of them, (other than the said late abbots, abbesses, priors, prioresses, and other governors and governesses, and their successors, and the successors of every of them, and such as pretend to be founders, patrons, or donors of the monasteries, abbathies, priories, nunneries, colleges, hospitals, and other religious or ecclesiastical houses or places, or of any of them, or of any manors, messuages, lands, tenements, or other hereditaments, late belonging to the same, or to any of them, and their heirs, successors, and the heirs and successors of every such founder, patron, or donor, all such right, title, interest, possession, rents, annuities, commodities, offices, fees, liveries, and livings, portions pensions, corrodies, synods, proxies, or other profits, which they or any of them have, ought, or might have had, in or to any of the said monasteries, abbathies, priories, colleges, hospitals, manors, lands, tenements, rents, services, reversions, tithes, pensions, portions, or other hereditaments, at any time before any such purchase, indentures, fines, feoffments, recoveries, or other lawful mean between any such

parties had or made, as is abovesaid; this act, or any thing therein contained, to the contrary notwithstanding.

'XVI. And where our said sovereign lord, sith the fourth day of *February*, 'the said twenty-seventh year of the reign of our said sovereign lord, hath 'obtained and purchased, as well by exchanges, as by gifts, bargains, fines, 'sundry feoffments, recoveries, deeds enrolled, and otherwise, of divers 'and sundry persons, many and divers honours, castles, manors, lands, te-'nements, meadows, pastures, woods, rents, reversions, services, and other 'hereditaments, and hath not only paid divers and sundry great sums of 'money for the same, but also hath given and granted for the same, unto 'divers and sundry persons, divers and sundry manors, lands, tenements, 'and hereditaments, and other recompences in and for full satisfaction of 'all such honours, castles, manors, lands, tenements, rents, reversions, ser-'vices, and other his hereditaments, by his highness obtained or had, as is 'abovesaid:' be it therefore enacted by the authority aforesaid, that our said sovereign lord the king, his heirs and successors, shall have, hold, possess, and enjoy, all such honours, castles, manors, lands, tenements, and other hereditaments, as his highness sith the said fourth day of *February*, the twenty-seventh year abovesaid, hath obtained and had by way of exchange, bargain, purchase, or other whatsoever mean or means, according to the true meaning and intent of his highness bargain, exchange, or purchase, misrecital, misnaming, or nonrecital, or not naming of the said honours, castles, manors, lands, tenements, and other hereditaments, comprized or mentioned in the bargains or writings made between the king's highness, and any other party or parties, or of the towns or counties where the said honours, castles, manors, lands, tenements, and hereditaments, lie and been, or any other matter or cause whatsoever it be, in anywise notwithstanding.

XVII. Saving to all and every person and persons, and to their heirs, bodies politick and corporate, and to their successors, and to every of them, other than such person or persons, and their heirs and their wives, and the wives of every of them, bodies politick and corporate, and their successors, and every of them, of whom the king's highness hath obtained by exchange, gift, bargain, fine, feoffment, recovery, deed enrolled, or otherwise, any such honours, castles, manors, lands, tenements, and other hereditaments, as is aforesaid, all such right, title, use, interest, possession, rents, charges, annuities, commodities, fees, and other profits, (rents, services, and rents seck only except,) which they, or any of them, have, might, or ought to have had, in or to the premises so obtained and had, or in or to any parcel thereof, if this act had never been had nor made; this present act, or any thing therein contained to the contrary notwithstanding.

'XVIII. And where it hath pleased the king's highness of his most 'abundant grace and goodness, as well upon divers and sundry considera-'tions his majesty specially moving, as also otherwise, to have bargained, 'sold, changed, or given, and granted by his grace's several letters patents, 'indentures, or other writings, as well under his highness great seal, as 'under the seal of his highness dutchy of *Lancaster*, and the seal of the 'office of the augmentations of his crown, unto divers and sundry of his 'loving and obedient subjects, divers and sundry honours, castles, manors, 'monasteries, abbathies, priories, lands, tenements, rents, reversions, ser-'vices, parsonages appropriate, advowsons, liberties, tithes, oblations, por-'tions, pensions, franchises, privileges, liberties, and other hereditaments, 'commodities and profits, in fee simple, fee-tail, for term of life, or for 'term of years; for avoiding of which letters patents, and of the contents

'of the same, divers, sundry, and many ambiguities, doubts, and questions 'might hereafter arise, be moved, and stirred, as well for misrecital or 'nonrecital, as for divers other matters, things, or causes to be alledged, 'objected, or invented against the said letters patent, as also for lack of 'the finding of offices or inquisitions, whereby the title of his highness 'therein ought to have been found, before the making of the same letters 'patents, or for misrecital or nonrecital of leases, as well of record, as not 'of record, or for lack of the certainty of the values, or by reason of mis-'naming of the honours, castles, manors, monasteries, abbathies, priories, 'lands, tenements, and other hereditaments comprised and mentioned 'within the same letters patents, or of the towns and counties where the 'same honours, castles, manors, monasteries, abbathies, priories, lands, te-'nements, rents, and other hereditaments lien and been, as for divers and 'sundry other suggestions and surmises, which hereafter might happen to 'be moved, surmised, and procured against the same letters patents, albeit 'the words in effect contained in the said letters patents be according to 'the true intent and meaning of his most royal majesty:'

XIX. Be it therefore enacted by the authority of this present parliament, that as well all and every the said letters patents, indentures, and other writings, and every of them, under the seal or seals abovesaid, or of any of them, made or granted by the king's highness sithen the said fourth day of *February*, the said twenty-seventh year of his most noble reign, as all and singular other his grace's letters patents, indentures, or other writings to be had, made, or granted to any person or persons within three years next after the making of this present act, of any honours, castles, manors, monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, or of other religious or ecclesiastical houses or places, sites, circuits, precincts, lands, tenements, parsonages, tithes, pensions, portions, advowsons, nominations, and all other hereditaments and possessions, of what kind, nature, or quality soever they be, or by whatsoever name or names they or any of them be named, known, or reputed, shall stand and be good, effectual, and available in the law of this realm, to all respects, purposes, constructions, and intents, against his majesty, his heirs, and successors, without any other licence, dispensation, or tolerance of the king's highness, his heirs, and successors, or of any other person or persons whatsoever they be, for any thing or things contained, or hereafter to be contained, in any such letters patents, indentures, or other writings: any cause, consideration, or thing material, to the contrary in anywise notwithstanding:

XX. Saving to all and singular persons, bodies politick and corporate, their heirs and successors, and the heirs and successors of every of them, (other than his highness, his heirs and successors, and the said governors and governesses, and their successors, donors, founders, and patrons, aforenamed, and their heirs and successors, and all other persons claiming in their rights, or to their use, or in the right or to the use of any of them,) all such right, title, claim, interest, possession, reversion, remainder, offices, annuities, rent-charges, and commons, which they or any of them have, ought, or might have had, in or to any of the said honours, castles, manors, monasteries, abbathies, priories, lands, tenements, and other hereditaments in the said letters patents made, or hereafter to be made, comprised at any time before the making of the said such letters patents; this act, or any thing therein contained, to the contrary notwithstanding.

'XXI. And where divers and sundry abbots, priors, abbesses, prioresses, 'and other ecclesiastical governors and governees of the said monasteries, 'abbathies, priories, nunneries, colleges, hospitals, houses of friers, and

'other religious and ecclesiastical houses and places, have had, possessed, 'and enjoyed, divers and sundry parsonages appropriated, tithes, pensions, 'and portions, and also were acquitted and discharged of and from the pay- 'ment or payments of tithes, to be paid out of or for their said monas- 'teries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, 'and other religious and ecclesiastical houses and places, manors, messu- 'ages, lands, tenements, and hereditaments:' be it therefore enacted by the authority abovesaid, that as well the king our sovereign lord, his heirs and successors, as all and every such person and persons, their heirs and assigns, which have, or hereafter shall have any monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, or other ecclesiastical houses or places, sites, circuits, precincts of the same, or any of them, or any manors, messuages, parsonages appropriate, tithes, pensions, portions, or other hereditaments, whatsoever they be, which belonged or appertained, or which now belong or appertain unto the said monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, or other religious and ecclesiastical houses or places, or unto any of them, shall have, hold, retain, keep, and enjoy, as well the said parsonages appropriate, tithes, pensions, and portions, of the said monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, sites, circuits, precincts, manors, messes, lands, tenements, and other hereditaments whatsoever they be, and every of them, according to their estates and titles, discharged and acquitted of payment of tithes, as freely, and in as large and ample manner as the said late abbots, priors, abbesses, prioresses, and other ecclesiastical governors and governesses, or any of them, had, held, occupied, possessed, used, retained, or enjoyed the same, or any parcel thereof, at the days of their dissolution, suppression, renouncing, relinquishing, forfeiting, giving up, or coming to the king's highness, of such monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, or other religious or ecclesiastical houses or places, or at the day of the dissolution, suppression, renouncing, relinquishing, giving up, or coming to the king's highness of any of them; this act, or any thing therein contained, to the contrary notwithstanding:

XXII. Saving to the king's highness, his heirs and successors, all and all manner of rents, services, and other duties whatsoever they be, as if this act had never been had nor made.

XXIII. And be it further enacted by authority of this present parliament, that such of the said late monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, and all churches and chapels to them, or any of them belonging, which, before the dissolution, suppression, renouncing, relinquishing, forfeiting, giving up, or coming unto the king's highness, were exempted from the visitation or visitations, and all other jurisdiction of the ordinary or ordinaries, within whose diocese they were situate or set, shall from henceforth be within the jurisdiction and visitation of the ordinary or ordinaries within whose diocese they or any of them be situate and set, or within the jurisdiction and visitation of such person or persons as by the king's highness shall be limited or appointed; this act, or any other exemption, liberty, or jurisdiction to the contrary notwithstanding.

No. XXVI.—P. 149.

28 H. VIII. c. 11. A. D. 1536.

For the Restitution of the First-fruits in Time of Vacation to the next Incumbent.

'Forasmuch as in the statute of the payment unto the king's majesty, 'his heirs and successors, of the first-fruits of spiritual promotions, offices, 'benefices, and dignities, within this realm, and other the king's dominions, 'express mention and declaration is not had ne made, from what time the 'year shall be accounted, in which the first-fruits shall be due and payable 'to his highness, that is to wit, whether immediately from the death, re-'signation, or deprivation of every incumbent, or from the time of admis-'sion or new taking of possession in every such promotion.

'II. And also by reason that in the same statute it is not declared who 'shall have the fruits, tithes, and other profits of the said benefices, offices, 'promotions, and dignities spiritual, during the time of vacation thereof, 'divers of the archbishops and bishops of this realm have, not only when 'the time of perceiving and taking of tithes, (that is to say, wool, lamb, 'corn, and hay, and tithes usually paid at the holy time of *Easter*) hath 'approached, deferred the collation of such benefices as have been of their 'own patronage, but also have, upon presentations of clerks made unto 'them by the just patrons, protracted and deferred to institute, induct, and 'admit the same clerks, to the intent that they might have and perceive to 'their own use the same tithes growing during the vacation; so that 'through such delays (over and above the first-fruits, which be justly due 'to the king's highness) they have been constrained also to lose all or the 'most part of one year's profits of their benefices and promotions, and to 'serve the cure at their and their friends proper costs and charges, or utterly 'to forsake and give over their benefices and promotions, to their great loss 'and hindrance:'

III. For reformation whereof, be it ordained and enacted by the king our sovereign lord, with the assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, the said year, in which the first-fruits shall be paid to the king's grace, shall begin and be accounted immediately after the avoidance or vacation of any such benefice or promotions spiritual afore rehearsed; and that the tithes, fruits, oblations, obventions, emoluments, commodities, advantages, rents, and all other whatsoever revenues, casualties, or profits certain and uncertain, affering or belonging to any archdeaconry, deanry, prebend, parsonage, vicarage, hospital, wardenship, provostship, or other spiritual promotion, benefice, dignity, or office, (chaunteries only except,) within this realm, or other the king's dominions, growing, rising, or coming, during the time of vacation of the same promotion spiritual, shall belong and affere to such person as shall be thereunto next presented, promoted, instituted, inducted, or admitted, and to his executors, towards the payment of the first-fruits to the king's highness, his heirs and successors; any usage, custom, liberty, privilege, or prescription, to the contrary had, used, or being, in anywise notwithstanding.

IV. And it is also enacted by the authority aforesaid, that if any archbishop, bishop, archdeacon, ordinary, or any other person or persons to their uses and behoof, at any time heretofore sith the first day of May last past, have perceived, received, or taken, or at any time hereafter do perceive, receive, or take, the fruits, tithes, obventions, oblations, emoluments, commodities, revenues, rents, advantages, profits, or casualties, coming,

growing, or belonging, or which hereafter shall come, grow, affere, or belong to any archdeaconry, deanry, prebend, parsonage, vicarage, hospital, wardenship, provostship, or other spiritual promotion, benefice, dignity, or office, (chaunteries only excepted,) within this realm, or other the king's dominions, during the vacation of such archdeaconry, deanry, prebend, parsonage, vicarage, hospital, wardenship, provostship, or other spiritual promotion, benefice, dignity, or office, (chaunteries only excepted,) and the same upon reasonable request from henceforth to be made, doth not render, restore, satisfy, content, and pay to the next incumbent, being lawfully instituted, inducted, or admitted to such archdeaconry, deanry, prebend, parsonage, or vicarage, or other promotion, benefice, dignity, or office spiritual, except before excepted, or do let or interrupt the said incumbent to have the same; that then every archbishop, bishop, archdeacon, ordinary, or other person so doing, shall forfeit and lose the treble value of so much as he shall then have received of the fruits of every prebend, parsonage, vicarage, hospital, wardenship, provostship, or other spiritual promotion, whereof he so shall perceive, receive or detain, let or interrupt the incumbent to perceive, receive, and have the fruits, tithes, obventions, oblations, emoluments, commodities, revenues, rents, advantages, profits, or casualties; the moiety of which forfeiture shall be to the king our sovereign lord, and the other moiety thereof to the incumbent of the same prebend, parsonage, or vicarage, or other spiritual promotion, to be recovered in any of the king's courts, by action, bill, plaint, information, or otherwise, in which action or suit the defendant shall not be admitted to wage his law, nor any protection or essoin shall be unto the defendant allowed.

V. Provided always, that it shall be lawful to every archbishop, bishop, archdeacon and ordinary, their officers and ministers, to retain in his or their custody so much of the tithes, fruits, obventions, oblations, emoluments, commodities, advantages, rents, revenues, casualties, and profits, as shall amount to pay unto such person or persons, as hath or shall serve or keep the cure of such archdeaconry, deanry, prebend, parsonage, or vicarage, or other spiritual promotion, during the vacation, his or their reasonable stipend or salary; and also for the collection, gathering, and levying of such tithes, fruits, emoluments, rents, and other profits rising and growing during the vacation aforesaid; any thing in this act contained to the contrary in anywise notwithstanding.

VI. Provided also, and be it further enacted by the authority aforesaid, that in case any of the incumbents aforesaid happen to die, and before his death have caused any of his glebe lands to be manured and sown at his proper costs and charges with any corn or grain, that then, in that case, all and every of the same incumbents may make and declare their testaments of all the profits of the corn growing upon the said glebe lands so manured and sown; any thing contained in this present act in anywise notwithstanding.

No. XXVII.—P. 149.

Stat. 32 H. VIII. c. 7. A. D. 1540.

For the true Payment of Tithes and Offerings.

'Where divers and many persons inhabiting in sundry countries and 'places of this realm, and other the king's dominions, not regarding their 'duties to Almighty God, and to the king our sovereign lord, but in few 'years past more contemptuously and commonly presuming to offend and 'infringe the good and wholesome laws of this realm, and gracious com-

'mandments of our said sovereign lord, than in times past hath been seen 'or known, have not letted to subtract and withdraw the lawful and ac- 'customed tithes of corn, hay, pasturages, and other sort of tithes and ob- 'lations commonly due to the owners, proprietaries, and possessors of the 'parsonages, vicarages, and other ecclesiastical places of and within the 'said realm and dominions, being the more encouraged thereto, for that 'divers of the king's subjects, being lay persons, having parsonages, vi- 'carages, and tithes to them, and to their heirs, or to them, and to their 'heirs of their bodies lawfully begotten, or for term of life, or years, can- 'not by the order and course of the ecclesiastical laws of this realm, sue in 'any ecclesiastical court for the wrongful withholding and detaining of the 'said tithes, or other duties, nor cannot by the order of the common laws 'of this realm have any due remedy against any person or persons, their 'heirs or assigns, that wrongfully detaineth or withholdeth the same; by 'occasion whereof much controversy, suit, variance, and discord is like to 'insurge and ensue among the king's subjects, to the great detriment, da- 'mage, and decay of many of them, if convenient and speedy remedy 'therefore be not had and provided:'

II. Wherefore it is ordained and enacted by our said sovereign lord the king, with the assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by authority of the same, that all and singular persons of this his said realm, or other his dominions, of what estate, degree, or condition soever he or they be, shall fully, truly, and effectually divide, set out, yield, or pay, all and singular tithes and offerings aforesaid, according to the lawful customs and usages of parishes and places where such tithes or duties shall grow, arise, come, or be due; and in case that shall happen, any person or persons, of his or their ungodly or perverse will and mind, to detain and withhold any of the said tithes or offerings, or any part or parcel thereof, then the person or persons, being ecclesiastical or lay person, having cause to demand or have the said tithes or offerings, being thereby wronged or grieved, shall and may convent the person or persons so offending before the ordinary, his commissary, or other competent minister, or lawful judge of the place where such wrong shall be done, according to the ecclesiastical laws; and in every such cause or matter of suit, the same ordinary, commissary, or other competent minister, or lawful judge, having the parties, or their lawful procurators, before him or them, shall and may, by virtue of this act, proceed to the examination, hearing, and determination of every such cause or matter ordinarily or summarily, according to the course and process of the said ecclesiastical laws, and thereupon may give sentence accordingly.

III. And in case that any of the parties, for any cause or matter concerning that suit, do appeal from the sentence, order, and definitive judgment of the said ordinary, or other competent judge, as is aforesaid, then the same judge, by virtue of this act, forthwith upon such appellation made, shall adjudge to the other party the reasonable costs of his suit therein before expended, and shall compel the same party appellant to satisfy and pay the same costs so adjudged by compulsory process, and censures of the said laws ecclesiastical, taking surety of the other party to whom such costs shall be adjudged and paid, to restore the same costs to the party appellant, if after the principal cause of that suit of appeal shall be adjudged against the same party to whom the same costs shall be yielden; and so every ordinary, or other competent judge ecclesiastical, by virtue of this act shall adjudge costs to the other party upon every appeal to be made in any suit or cause

of subtraction, or detention of any tithes, or offerings, or in any other suit to be made for or concerning the duty of such tithes or offerings.

IV. And farther be it enacted by the authority aforesaid, that if any person or persons, after such sentence definitive given against them, obstinately and wilfully refuse for to pay their tithes, or duties, or such sums of money so adjudged, wherein they be condemned for the same, that then two justices of the peace for the same shire, whereof one to be of the quorum, shall have authority by this act, upon information, certificate, or complaint to them made in writing by the said ecclesiastical judge that gave the same sentence, to cause the same party so refusing to be attached, and committed to the next gaol, and there to remain, without bail or mainprize, till he or they shall have found sufficient sureties to be bound by recognizance, or otherwise, before the same justices, to the use of our sovereign lord the king, to perform the said definitive sentence and judgment.

V. Provided always, and be it enacted by the authority aforesaid, that no person or persons shall be sued, or otherwise compelled to yield, give, or pay any manner of tithes, for any manors, lands, tenements, or other hereditaments, which by the laws or statutes of this realm are discharged, or not chargeable with the payment of any such tithes.

VI. Provided also, and be it enacted by authority aforesaid, that this act, nor any thing therein contained, shall in anywise bind the inhabitants of the city of *London*, and suburbs of the same, for to pay their tithes and offerings within the same city and suburbs otherwise than they ought or should have done before the making of this act; any thing in this act contained to the contrary notwithstanding.

VII. And be it further enacted by the authority aforesaid, that in all cases, where any person or persons which now have, or which hereafter shall have any estate of inheritance, freehold, term, right, or interest, of, in, or to any personage, vicarage, portion, pension, tithes, oblations, or other ecclesiastical or spiritual profit, which now be, or which hereafter shall be made temporal, or admitted to be, abide, and go to or in temporal hands, and lay uses and profits by the law or statutes of this realm, shall hereafter fortune to be disseised, deforced, wronged, or otherwise kept or put from their lawful inheritance, estate, seisin, possession, occupation, term, right, or interest, of, in, or to the same, or of, in, or to any parcel thereof, by any other person or persons claiming or pretending to have interest or title in or to the same; that then in all and every such case or cases, the person or persons so disseised, deforced, or wrongfully kept or put from his or their right or possession, as is afore rehearsed, their heirs, wives, and such other to whom such injury and wrong shall be done or committed, shall and may have their remedy in the king's temporal courts, or other temporal courts, as the case shall require, for the recovery, getting, or obtaining of such inheritance, estate, freehold, seisin, possession, term, right, or interest, by writs original of *præc' quod reddat*, assize of *novel deisseisin*, *mortdanc' quod ei defortiat*, writs of dower, or other writs original, as the case shall require, to be devised and granted in the king's court of chancery, of every such personage, vicarage, portion, pension, or other profit called ecclesiastical or spiritual, so to be demanded according to the nature and cause of the suit thereof, in like manner and form as they should, ought, or might have had, of or for lands, tenements, or other hereditaments in such manner to be demanded; and that writs of covenant and other writs for fines to be levied, and all other assurances to be had, made, or conveyed, of any such personage, vicarage, portion, pension, or other profit called ecclesiastical or

spiritual, as is aforesaid, shall be hereafter devised and granted in the said chancery according as hath been used for fines to be levied, and assurance to be had or made, or conveyed, of lands, tenements, or other hereditaments; and that all judgments to be given upon any of the said writs original, so to be devised or granted of or for any the premisses, or any of them, and all fines to be levied and knowledged in any of the king's said courts thereof, shall be of like force and effect in the law, to all intents and purposes, as judgments given, and fines levied of lands, tenements, and hereditaments in the same courts upon writs original therefore duly pursued and prosecuted, albeit no such form of writs original out of the said court of chancery have heretofore proceeded or been awarded.

VIII. Provided always, that this last act shall not extend nor be expounded to give any remedy, cause of action or suit in the courts temporal against any person or persons which shall refuse or deny to set out his or their tithes, or which shall detain, withhold, or refuse to pay his tithes or offerings, or any parcel thereof; but that in all such cases the person or party, being ecclesiastical or lay person, having cause to demand or have the said tithes or offerings, and thereby wronged or grieved, shall take and have their remedy for their said tithes or offerings in every such case in the spiritual courts, according to the ordinance in the first part of this act mentioned, and not otherwise; any thing herein expressed to the contrary thereof notwithstanding.

No. XXVIII.—P. 150.

Stat. 32 H. VIII. c. 24. A. D. 1540.

An Act concerning the Possessions of St. John *of* Jerusalem, *in* England *and* Ireland.

'The lords spiritual and temporal, and the commons, in this present 'parliament assembled, having credible knowledge, that divers and sundry 'the king's subjects, called the knights of *Rhodes*, otherwise called knights 'of St. *Johns*, otherwise called friars of the religion of St. *John* of *Jerusa-* 'lem in *England*, and of a like house being in *Ireland*, abiding in the parts 'beyond the sea, and having as well out of this realm, as out of *Ireland*, 'and other the king's dominions, yearly great sums of money for main- 'tenance of their livings, have unnaturally, and contrary to the duty of 'their allegiancies, sustained and maintained the usurped power and au- 'thority of the bishop of *Rome*, lately used and practised within this realm, 'and other the king's dominions; and have not only adhered themselves to 'the said bishop, being common enemy to the king our sovereign lord, and 'to this his realm, untruly upholding, knowledging, and affirming malici- 'ously and traiterously the same bishop to be supreme and chief head of 'Christ's church by God's holy word, intending thereby to subvert and 'overthrow the good and godly laws and statutes of this realm, their na- 'tural country, made and grounded by authority of holy church, by the 'most excellent wisdom, policy, and goodness of the king's majesty, with 'the whole assent and consent of the realm, for the abolishing, expulsing, 'and utter extincting of the said usurped power and authority, but also 'have defamed and slandered as well the king's majesty, as the noblemen, 'prelates, and other the king's true and loving subjects of this realm, for 'their good and godly proceeding in that behalf; have therefore deeply 'pondered and considered, that like as it is and was a most godly act of the 'king's most royal majesty, and the said noblemen, prelates, and commons, 'of this realm, utterly to expulse and abolish, not only from this realm,

'but also from other the king's dominions, the said usurped power and authority of the bishop of *Rome*, and also the hypocritical and superstitious religion in this realm, and other the king's dominions, being his members and adherents, having their original erection and foundation by the said usurped authority; by expulsing whereof God's holy word, necessary for increase of virtue, and salvation of christen souls, is not only purely and sincerely advanced, and set forth, but also the extort exactions of innumerable sums of money craftily exhausted out of this realm, and of other the king's dominions, by the colour of the said usurped authority, is removed, and taken away, to the inestimable benefit and commodity of the king's loving subjects; so like manner of wise, it should be most dangerous to be suffered or permitted within this realm, or in other the king's dominions, any religion, being sparks, leaves, and imps of the said root of iniquity; considering also, that the isle of *Rhodes*, whereby the said religion took their old name and foundation, is surprised by the *Turk*; and that it were and is much better, that the possessions in this realm, and in other the king's dominions, appertaining to the said religion, should rather be imployed and spent within this realm, and in other the king's dominions, for the defence and surety of the same, than converted to and among such unnatural subjects, who have declined not only from their natural duty of obedience that they ought to bear unto the king our sovereign lord, but also from the good laws and statutes of this realm, their natural country, daily doing, and attempting privily and craftily all that they can to subvert the good and godly policy, in the which, thanks be to God and our most dread sovereign lord, this realm and other the king's dominions now stand; in consideration whereof, the said lords spiritual and temporal, and the commons, in this present parliament assembled, most humbly beseechen the king's most royal majesty,' that it may be enacted by his highness, and by the assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, that the corporation of the said religion as well within this realm, as within the king's dominion and land of *Ireland*, by whatsoever name or names they be founded, incorporated, or known, shall be utterly dissolved, and void to all intents and purposes; and that Sir *William Weston* knight, now being prior of the said religion of this realm of *England*, shall not be named or called from henceforth, prior of St. *Johns* of *Jerusalem* in *England*, but shall be called by his proper name of *William Weston* knight, without further addition touching the said religion; and that likewise *John Rauson* knight, now being prior of *Kilmainam* in *Ireland*, shall not be called or named from henceforth, prior of *Kilmainam* in *Ireland*, but only by his proper name of *John Rauson* knight, without further addition touching the said religion; nor that any of the brethren or confreres of the said religion in this realm of *England*, and land of *Ireland*, shall be called knights of *Rhodes*, nor knights of St. *Johns*, but shall be called by their own proper christen names and surnames of their parents, without any other addition touching the said religion.

II. And be it further enacted by authority of this present parliament, that if the said *William Weston*, or any of his brethren or confreres of the hospital or house of St. *John* of *Jerusalem* in *England*, now abiding and dwelling within this realm of *England*, or any other person or persons, being members professed of or in the said hospital, now dwelling within the said realm, at any time after the first day of *July* next coming, do use or wear within this realm or elsewhere, in or upon any apparel of their bodies, any sign, mark, or token heretofore used and accustomed, or

hereafter to be devised for the knowledge of the said religion, or make any congregations, chapiters, or assemblies touching the same religion; or maintain, support, use, or defend any liberties, franchises, or privileges heretofore granted to the said religion, by the authority of the bishop of *Rome*, or of the see of the same; that then every of them so offending shall incur and run into the pains, forfeitures, and penalties ordained and provided by the statute of provision and *præmunire*, made in the sixteenth year of king *Richard* the second; and if the said *John Rouson* knight, or any of his brethren, or confreres of the said hospital or house of *Kilmainam* in *Ireland*, or any other person or persons, being members professed of or in the said hospital of *Kilmainam*, now abiding, and now dwelling within the land of *Ireland*, at any time after the last day of *September* next coming, do use or wear within this realm, or within the said land of *Ireland*, or elsewhere, in or upon any apparel of their bodies, any sign, mark, or token heretofore used and accustomed, or hereafter to be devised for the knowledge of the same religion, or make any congregations, chapiters, or assemblies touching the same religion, or maintain, support, use, or defend any manner of liberties, franchises, or privileges heretofore granted to the same, by authority of the bishop of *Rome*, or of the see of the same; that then every of them so offending shall incur and run into the pains, forfeitures, and penalties ordained and provided by the said statute of provision and *præmunire*, made in the said sixteenth year of king *Richard* the second.

III. And be it likewise enacted by the authority aforesaid, that if any the knights, or confreres of the said religion, being the king's natural subjects, which now inhabit, abide, and dwell out of any the king's dominions, at any time after the first day of *February* next coming, do offend in any of the articles or offences next above rehearsed, that then every of them so offending shall incur and run into the said pains, forfeitures, and penalties next above remembered.

IV. And be it further enacted by the authority aforesaid, that the king's majesty, his heirs and successors, shall have and enjoy all that hospital, mansion-house, church, and all other houses, edifices, buildings, and gardens to the same belonging, being near to the city of *London*, in the county of *Middlesex*, called the house of St. *Johns* of *Jerusalem* in *England*; and also all that hospital, church, and house of *Kilmainam* in the land of *Ireland*, and all and singular castles, honours, manors, meases, lands, tenements, rents, reversions, services, woods, meadows, pastures, parks, warrens, liberties, franchises, privileges, parsonages, tithes, pensions, portions, knights fees, advowsons, commandries, preceptories, contributions, responsions, rents, titles, entries, conditions, covenants, and all other possessions and hereditaments, of what natures, names, or qualities soever they be, and wheresoever they be or lie within this realm of *England*, or within the land of *Ireland*, or elsewhere, within the king's dominions, which appertained or belonged to the said religion, or to the priors, masters, or governors, knights, or other ministers professed of or in the same, by the pretence, or in the right of the said religion, and all and singular goods, chattels, debts, arrearages of rents and farms, and all other things real and personal, whatsoever they be, whereof or whereunto any of the said priors, brethren, or confreres, or persons professed in the said religion, can have, or claim any particular propriety to their own proper use, by the rules and statutes of the said religion; to have and to hold the premises, and every of them, to our said sovereign lord, and to his heirs and successors for ever, to use and employ, by his most excellent wisdom and discretion, at his own

free will and pleasure; and that his highness shall be deemed and adjudged in the real and actual possession of the premises, by virtue and authority of this present act: saving to all persons, and bodies politick, their heirs and successors, and the heirs and successors of every of them, (other than the said prior of St. *Johns of Jerusalem* in *England*, and the said prior of *Kilmainam* in the land of *Ireland*, and the brethren or confreres of every of them, and the successors of every of them, and all and every other person and persons of the said religion, and their successors, and every of them, and the successors of every of them,) all such right, title, interest, possession, leases, grants, annuities, fees, offices, corrodies, reversions, rents, and services, rent-charges, commons, rights, titles, entries, actions, petitions, pensions, portions, and all other hereditaments, of what names, natures, or qualities soever they be, which they have, should, or ought to have had, if this act had never been had ne made; any thing in this act to the contrary thereof notwithstanding.

No. XXIX.—P. 156.

Stat. 37 H. VIII. c. 12. A. D. 1545.

An Act for Tithes in London.

'Where of late time contention, strife, and variance hath risen and 'grown within the city of *London*, and the liberties of the same, between 'the parsons, vicars, and curates of the said city, and the citizens and in-'habitants of the same, for and concerning the payment of tithes, obla-'tions, and other duties within the said city and liberties: for appeasing 'whereof, a certain order and decree was made thereof by the most re-'verend father in God, *Thomas* archbishop of *Canterbury*, metropolitane, 'chief primate of all *England*, *Thomas Audley* knight, lord *Audley* of 'Walden, and then lord chancellor of *England*, now deceased, and other 'of the king's majesty's most honourable privy council, and also the king's 'letters patents, and proclamation was made thereof, and directed to the 'said citizens concerning the same; whereupon it was after enacted in the 'parliament holden at *Westminster*, by prorogation the fourth day of *Fe-'bruary*, in the twenty-seventh year of the king's majesty's most noble 'reign, by authority of the same parliament, that the citizens and the in-'habitants of the same city should, at *Easter* then next coming, pay unto 'the curates of the said city and suburbs, all such and like sums of money 'for tithes, oblations, and other duties, as the said citizens and inhabitants 'by the order of the said late lord chancellor, and other the king's most 'honourable council, and the king's said proclamation, paid or ought to 'have been paid by force and virtue of the said order at *Easter*, which was 'in the year of our Lord God, mdxxxv, and the same payments so to 'continue from time to time, until such time as any other order or law 'should be made, published, ratified, and confirmed by the king's high-'ness, and the two and thirty persons by his grace to be named, as well 'for the full establishment concerning the payment of all tithes, oblations, 'and other duties for the inhabitants within the said city, suburbs, and li-'berties of the same, as for the making of other ecclesiastical laws for this 'realm of *England*, and that every person denying to pay, as is aforesaid, 'should, by the commandment of the mayor of *London* for the time being, 'be committed to prison, there to remain until such time as he or they 'should have agreed with the curate or curates for their said tithes, obla-'tions, and other duties, as is aforesaid, as in the said act more plainly ap-'peareth: sithen which act divers variances, contentions, and strifes are 'newly risen and grown between the said parsons, vicars, and curates, and

'the said citizens and inhabitants, touching the payment of the tithes, oblations, and other duties, by reason of certain words and terms specified 'in the said order, which are not so plainly and fully set forth, as is thought 'convenient and meet to be; for appeasing whereof, as well the said parsons, vicars, and curates, as the said citizens and inhabitants have compromitted and put themselves to stand to such order and decree touching 'the premises, as shall be made by the said right reverend father in God, 'Thomas archbishop of *Canterbury*, metropolitane and primate of *England*; 'the right honourable Sir *Thomas Wryothesly* knight, Lord *Wryothesly* and 'lord chancellor of *England*; the right honourable *Thomas* duke of *Norfolk*, 'lord treasurer of *England*; the right honourable sir *William Paulet* knight; 'lord *St. John*, lord president of the council, and lord great master of the 'king's most honourable houshold; the right honourable sir *John Russel*, 'knight, lord *Russel* and lord privy seal; the right honourable *Edward* earl 'of *Hertford*, lord great chamberlain of *England*; the right honourable 'John viscount *Lisle*, high admiral of *England*; sir *Richard Lister* knight, 'chief justice of *England*; sir *Edward Montague*, knight, chief justice of 'the common bench at *Westminster*; and sir *Roger Cholmely* knight, chief 'baron of the exchequer; for a final end and conclusion to be had and 'made touching the premises for ever. And to the intent to have a full 'peace and perfect end between the said parties, their heirs and successors, 'touching the said tithes, oblations, and other duties for ever,' be it enacted by authority of this present parliament, that such end, order, and direction, as shall be made, decreed, and concluded by the forenamed archbishop, lords, and knights, or any six of them, before the first day of *March* next ensuing, of, for, and concerning the payments of the tithes, oblations, and other duties within the said city, and the liberties of the same, and inrolled in the king's high court of chancery of record, shall stand, remain, and be as an act of parliament, and shall bind as well all citizens and inhabitants of the said city and liberties for the time being, as the said parsons, vicars, curates, and their successors for ever, according to the effect, purport, and intent of the said order and decree so to be made and inrolled; and that every person denying to pay any of his or their tithes, oblations, or other duties, contrary to the said decree so to be made, shall, by the commandment of the mayor of *London* for the time being, and in his default or negligence, by the lord chancellor of *England* for the time being, be committed to prison, there to remain till such time as he or they have agreed with the curate and curates for his or their said tithes, oblations, and other duties, as is aforesaid.

THE DECREE.

II. As touching the payment of tithes in the city of *London*, and the liberties of the same, it is fully ordered and decreed by the most reverend father in God, *Thomas* archbishop of *Canterbury*, primate and metropolitane of *England*; *Thomas* lord *Wryothesly*, lord chancellor of *England*; *William* lord *St. John*, president of the king's majesty's council, and lord great master of his highness houshold; *John* lord *Russel*, lord privy seal; *Edward* earl of *Hertford*, lord great chamberlain of *England*; *John* viscount *Lisle*, high admiral of *England*; *Richard Lister* knight, chief justice of *England*; and *Roger Cholmely* knight, chief baron of his grace's exchequer; this present twenty-fourth day of *February*, *anno Domini*, *secundum cursum & computationem ecclesiæ Anglicanæ*, *millesimo quingentesimo quadragesimo quinto*, according to the statute in such case lately provided, that the citizens and inhabitants of the said city of *London*, and liberties of the same, for the time being, shall yearly without fraud or covin for ever pay their tithes to

the parsons, vicars, and curates of the said city, and their successors for the time being, after the rate hereafter following; that is to wit, of every xs. rent by the year of all and every house and houses, shop, warehouses, cellars, stables, and every of them within the said city and liberty of the same, xvj d. ob.; and of every xxs. rent by the year of all and every such house and houses, shops, warehouses, cellars, and stables, and every of them within the said city and liberties, ijs. and ixd.; and so above the rent of xxs. by the year, ascending from xs. to xs. according to the rate aforesaid.

III. *Item*, That where any lease is or shall be made of any dwelling house or houses, shops, warehouses, cellars, or stables, or any of them, by fraud or covin, reserving less rent than hath been accustomed, or is, or that any such lease shall be made without any rent reserved upon the same, by reason of any fine or income paid beforehand, or by any other fraud or covin; that then in every such case the tenant or farmer, tenants and farmers thereof shall pay, for his or their tithes of the same, after the rate aforesaid, according to the quality of such rent or rents, as the same house or houses, shops, warehouses, cellars, or stables, or any of them were last letten for, without fraud or covin, before the making of such lease.

IV. *Item*, That every owner or owners, inheritor or inheritors of any dwelling house or houses, shops, warehouses, cellars, or stables, or any of them, within the said city and liberties, inhabiting or occupying the same himself or themselves, shall pay after such rate or tithes as is abovesaid, after the quantity of such yearly rent as the same was last letten for, without fraud or covin.

V. *Item*, If any person or persons have taken, or hereafter shall take any mease or mansion place by lease, and the taker or takers thereof, his or their executors or assigns, doth or shall inhabit in any part thereof, and have or hath within eight years last past before this order, or hereafter will or shall let out the residue of the same, that then in such case the principal farmer or farmers, or first taker or takers thereof, his or their executors or assigns, shall pay his or their tithes, after the rate aforesaid, according to his or their quantity therein, and that his or their executors, assignee or assignees, shall pay his or their tithes after the rate abovesaid, according to the quantity of their rent by year.

VI. And that if any person or persons have, or shall take divers mansion houses, shops, warehouses, cellars, or stables, in one lease, and letteth, or shall let out one or more of the said houses, and keepeth or shall keep one or more in his or their own hands, and inhabiteth or inhabit in the same, that then the said taker or takers, and his or their executors or assigns shall pay his or their tithes after the rate abovesaid, according to the quantity of the yearly rent of such mansion house or houses, retained in his or their hands; and that his assignee or assignees of the residue of the said mansion house or houses, shall pay his or their tithes after the rate abovesaid, according to the quantity of their yearly rents.

VII. *Item*, If such farmer or farmers, or his or their assigns of any mansion house or houses, warehouses, shops, cellars, or stables, hath at any time within eight years last past, or shall hereafter let over all the said mansion house or houses contained in his or their lease, to one person, or to divers persons, that then the inhabitants, lessees, or occupiers of them, and every of them, shall pay their tithes after the rate of such rents as the inhabitants, lessees, or occupiers, and their assignee or assignees have been or shall be charged withal, without fraud or covin.

VIII. *Item*, If any dwelling house, within eight years last past, was, or hereafter shall be, converted into a warehouse, storehouse, or such like,

or if a warehouse, storehouse, or such like, within the said eight years, was, or hereafter shall be, converted into a dwelling house, that then the occupiers thereof shall pay tithes for the same, after the rate above declared of mansion house rents.

IX. *Item*, That where any person shall demise any dyehouse or brewhouse, with implements convenient and necessary for dying or brewing, reserving a rent upon the same, as well in respect of such implements; as in respect of such dyehouse or brewhouse, that then the tenant shall pay his tithes after such rate as is abovesaid, the third penny abated: and that every principal house or houses, with key or wharf, having any crane or gibet belonging to the same, shall pay after the like rate of their rents, as is aforesaid, the third penny abated: and that other wharfs belonging to houses having no crane or gibet, shall pay for his tithes as shall be paid for mansion houses, in form aforesaid.

X. *Item*, That where any mansion house, with a shop, stable, warehouse, wharf with crane, timber yard, teinter yard, or garden, belonging to the same, or as parcel of the same, is or shall be occupied together, that if the same be hereafter severed or divided, or at any time within eight years last past were severed or divided, that then the farmer or farmers, occupier or occupiers thereof, shall pay such tithes as is abovesaid, for such shops, stable, warehouses, wharf with crane, timber yard, teinter yard, or garden, aforesaid, so severed or divided, after the rate of their several rents thereupon reserved.

XI. *Item*, That the said citizens and inhabitants shall pay their tithes quarterly, that is to say, at the feast of *Easter*, the nativity of St. *John Baptist*, the feast of St *Michael the Archangel*, and the nativity of our Lord, by even portions.

XII. *Item*, That every housholder paying ten shillings rent or above, shall, for him or herself, be discharged of their four offering days: but his wife, children, servant, or others of their family, taking the rights of the church at *Easter*, shall pay two-pence for their four offering days yearly.

XIII. Provided always, and it is decreed, that if any house or houses which hath been or hereafter shall be letten for ten shillings rent by year, or more, be or hath, at any time within eight years last passed, or hereafter shall be divided and leased, into small parcels or members, yielding less yearly rent than ten shillings by the year: that then the owner or owners, if he or they dwell in any part of such house, or else the principal lessee and lessees, if the owner or owners do not dwell in some part of the same, shall from henceforth pay for his or their tithes after such rate of rent as the same house was accustomed to be letten for, before such division or dividing into parts or members; and the under farmer and farmers, lessee and lessees, to be discharged of all tithes for such small parcels, parts, or members, rented at less yearly rent than ten shillings by year, without fraud or covin, paying two-pence yearly for four offering-days.

XIV. Provided always, and it is decreed, that for such gardens as appertain not to any mansion house, and which any person or persons holdeth or shall hold in his or their hands for pleasure, or to his own use; that the then person so holding the same shall pay no tithes for the same: but if any person or persons, which holdeth, or shall hold any such garden, containing half an acre or more, doth or shall make any yearly profit thereof by way of sale; that then he or they shall pay tithes for the same, after such rate of his rent, as is herein first above specified.

XV. Provided also, that if any such gardens now being of the quantity of half an acre, or more, be hereafter by fraud or covin divided into less quantity or quantities, then to pay tithe according to the rate abovesaid.

XVI. Provided always, that this decree shall not extend to the houses of great men, or noble men, kept in their own hands and not letten for any rent, which in times past hath paid no tithes, so long as they shall so continue unletten: nor to any halls of crafts or companies, so long as they be kept unletten, so that the same halls in times past have not used to pay any tithes.

XVII. Provided always, and it is decreed, that this present order and decree shall not in anywise extend to bind or charge any sheds, stables, cellars, timber yards, ne teinter yards, which were never parcel of any dwelling-house, ne appertaining or belonging to any dwelling-house, ne have been accustomed to pay any tithes; but that the said citizens and inhabitants shall thereof be quit of payment of any tithes, as it hath been used and accustomed.

XVIII. Provided also, and it is decreed, that where less sum than after sixteen-pence halfpenny in the ten shillings rent, or less sum than two shillings nine pence in the twenty shillings rent, hath been accustomed to be paid for tithes; that then in such places the said citizens and inhabitants shall pay but only after such rate as hath been accustomed.

XIX. *Item*, It is also decreed, that if any variance, controversy, or strife, do or shall hereafter arise in the said city for non-payment of any tithes; or if any variance or doubt arise upon the true knowledge or division of any rent or tithes, within the liberties of the said city, or of any extent or assessment thereof, or if any doubt arise upon any other thing contained within this decree; that then upon complaint made by the party grieved, to the mayor of the city of *London* for the time being, the said mayor, by the advice of councel, shall call the said parties before him, and make a final end in the same, with costs to be awarded by the discretion of the said mayor and his assistants, according to the intent and purport of this present decree.

XX. And if the said mayor make not an end thereof within two months after complaint to him made, or if any of the said parties find themselves aggrieved, that then the lord chancellor of *England* for the time being, upon complaint to him made within three months then next following, shall make an end in the same, with such costs to be awarded as shall be thought convenient, according to the intent and purport of the said decree.

XXI. Provided always, that if any person or persons take any tenement for a less rent than it was accustomed to be letten for, by reason of great ruine or decay, brenning, or such like occasions or misfortunes; that then such person or persons, his executors or assigns, shall pay tithes only after the rate of the rent reserved in his or their lease, and none otherwise, as the same lease shall endure.

No. XXX.—P. 167.

13 Eliz. cap. 10. A. D. 1570.

Fraudulent Deeds made by Spiritual Persons to defeat their Successors of Remedy for Dilapidations shall be void, &c.

'Where divers and sundry ecclesiastical persons of this realm, being endowed and possessed of ancient palaces, mansion-houses, and other edifices and buildings, belonging to their ecclesiastical benefices or livings, have of late years not only suffered the same for want of due reparation partly to run to great ruin and decay, and in some part utterly to fall down to the ground, converting the timber, lead and stones to their own benefit and commodity; but also have made deeds of gift, colourable alienations,

'and other conveyances of like effect, of their goods and chattels in their 'lives-time, to the intent and of purpose, after their deaths, to defeat and 'defraud their successors of such just actions and remedies as otherwise 'they might and should have had for the same against their executors or ad-'ministrators of their goods, by the laws ecclesiastical of this realm, to the 'great defacing of the state ecclesiastical, and intolerable charges of their 'successors, and evil precedent and example for others, if speedy remedy 'be not provided:'

II. Be it therefore enacted by the queen's most excellent majesty, the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, that if any archbishop, bishop, dean, archdeacon, provost, treasurer, chaunter, chancellor, prebendary, or any other having any dignity or office in any cathedral or collegiate church within this realm; or if any parson, vicar, or other incumbent of any ecclesiastical living whereunto do belong any house or houses, or other buildings, which by law or custom he is bound to keep and maintain in reparation; do from henceforth make any deed or deeds of gift or alienation, or other like conveyances of his moveable goods or chattels, to the intent and purpose aforesaid; that then the successor and successors of him that shall make such deed or deeds of gift or alienation, shall and may, commence suit, and have such remedy in any court ecclesiastical of this realm competent for the matter against him or them to whom such deed or deeds of gift or alienation shall be so made, for the amendment and reparation of so much of the said dilapidations and decays, or just recompence for the same, as hath happened by his fact or default, in such sort as he might, should or ought lawfully to have, if he or they to whom such deed or deeds of gift or alienation shall be so made, were executor or executors of the testament, and last will of him that made such deed or deeds of gift or alienation, or were administrator or administrators of his goods or chattels; any law, custom or other thing to the contrary in any wise notwithstanding.

III. 'And for that long and unreasonable leases made by colleges, deans 'and chapters, parsons, vicars, and other having spiritual promotions, be 'the chiefest causes of the dilapidations and the decay of all spiritual livings 'and hospitality, and the utter impoverishing of all successors incumbents 'in the same;' be it enacted by the authority aforesaid, that from henceforth all leases, gifts, grants, feoffments, conveyances or estates, to be made, had, done, or suffered by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital, parson, vicar, or any other having any spiritual or ecclesiastical living, or any houses, lands, tithes, tenements or other hereditaments, being any parcel of the possessions of any such college, cathedral church, chapter, hospital, parsonage, vicarage or other spiritual promotion, or any ways appertaining or belonging to the same, or any of them, to any person or persons, bodies politick or corporate, (other than for the term of one and twenty years, or three lives, from the time as any such lease or grant shall be made or granted, whereupon the accustomed yearly rent or more shall be reserved and payable yearly during the said term) shall be utterly void and of none effect, to all intents, constructions and purposes; any law, custom or usage to the contrary any ways notwithstanding.

IV. Provided nevertheless, and be it enacted by the authority aforesaid, that this act, nor any thing therein contained, shall be taken or construed to make good any lease or other grant to be made by any such college or collegiate church within either of both the universities of *Oxford* and *Cam-*

bridge, or elsewhere within the realm of *England*, for more years than are limited by the private statutes of the same college.

V. Provided always, that this act shall not extend to any lease hereafter to be made upon surrender of any lease heretofore made, or by reason of any covenant or condition contained in any lease heretofore made, and now continuing, so that the lease to be made do not contain more years than the residue of the years of the former lease now continuing shall be at the time of such lease hereafter to be made, nor any less rent than is reserved in the said former lease. [4 Co. 120. 5 Co. 14. continued by 1 Jac. I. c. 25. & 21 Jac. I. c. 28. to the end of the next sessions of parliament, and further continued by 16 Car. I. c. 4.

13 Eliz. cap. 20. A. D. 1570.

An Act touching Leases of Benefices, and other Ecclesiastical Livings with Cure.

I. That the livings appointed for ecclesiastical ministers may not by corrupt and indirect dealings be transferred to other uses, be it enacted by the authority of this present parliament, that no lease after the fifteenth day of May next following the beginning of this parliament, to be made of any benefice or ecclesiastical promotion with cure, or any part thereof, and not being impropriated, shall endure any longer than while the lessor shall be ordinarily resident and serving the cure of such benefice without absence above fourscore days in any one year, but that every such lease, so soon as it or any part thereof shall come to any possession or use above forbidden, or immediately upon such absence, shall cease and be void: and the incumbent so offending shall for the same lose one year's profit of his said benefice, to be distributed by the ordinary among the poor of the parish: and that all chargings of such benefices, with cure hereafter with any pension, or with any profit out of the same to be yielded or taken, hereafter to be made, other than rents to be reserved upon leases hereafter to be made according to the meaning of this act, shall be utterly void.

II. Provided, that every parson by the laws of this realm allowed to have two benefices, may demise the one of them upon which he shall not then be most ordinarily resident, to his curate only, that shall there serve the cure for him; but such lease shall endure no longer than during such curate's residence, without absence above forty days in any one year: this act to continue to the end of the next parliament. [3 Car. c. 4. made perpetual. Note, that in this statute, these words (so soon as it or any part thereof shall come to any possession or use above forbidden, or) are repealed. 14 Eliz. c. 11. s. 14.]

14 Eliz. c. 11. A. D. 1574.

An Act for the Continuation, Explanation, Perfecting and Enlarging of divers Statutes.

XI. 'And where also in the said parliament begun and holden at *West-*
'*minster* the said second day of April, there was also one other act and sta-
'tute made for the avoiding of some leases in certain cases, to be made of
'ecclesiastical promotions with cure, intituled, *An Act touching Leases of*
'*Benefices and Ecclesiastical Livings with Cure;* which act was likewise
'made to continue to the end of the next parliament.

XIII. 'And where in the statute made in the thirteenth year of the
'queen's majesty's reign, intituled, *An Act for the Reviving and Continu-*
'*ance of certain Statutes, is contained one Proviso,* That the said act con-

'cerning the avoiding of foreign wares made by handicraftsmen beyond the 'seas, or any clause, article, or meaning therein contained, should not in 'any wise extend or be prejudicial to any intercourse or treaties of any in- 'tercourse then standing in force, had or made between the progenitors of 'the queen's majesty, or her highness, and any others: Now for good con- 'siderations and specially that strangers may not be at liberty, and the 'queen's majesty's natural subjects restrained,' Be it enacted, that the said proviso, and every clause, article and matter therein contained, shall from henceforth be repealed and utterly void.

XIV. 'Provided also, and be it enacted that these words, '[So soon as 'it or any part thereof shall come to any possession or use above forbidden, 'or]' which words are contained in the said statute made in the said thir- teenth year, touching leases of benefices, and other ecclesiastical livings with cure, shall not be revived by this act but remain discontinued, and shall from henceforth be omitted out of the said act; any thing in the said act, or in this act to the contrary notwithstanding.

XV. 'And where sundry evil-disposed persons have defrauded the true 'meaning of the said last mentioned statute made in the said thirteenth 'year, by bonds and covenants of suffering other persons to enjoy ecclesi- 'astical livings, and the fruits thereof, for that such bonds and covenants 'are not in law taken to be leases, although indeed they amount to as 'much;' Be it therefore enacted, that all bonds, contracts, promises, and covenants hereafter to be made for suffering or permitting any person to en- joy any benefice or ecclesiastical promotion with cure, or to take profits or fruits thereof, other than such bonds and covenants as shall be made for assurance of any lease heretofore made, shall be to all intents and purposes adjudged of such force and validity and not otherwise, as leases by the same persons made of such benefices and ecclesiastical promotions with cure.

XVI. And be it further declared and enacted, that all leases, bonds, pro- mises and covenants of and concerning benefices and ecclesiastical livings with cure, to be made by any curate, shall be of no other nor better force, validity or continuance, than if the same had been made by the beneficed person himself that demised, or shall demise the same to any such curate.

XVII. 'And where in one other act made in the said thirteenth year, in- 'tituled, *An Act against fraudulent Gifts, to the Intent to defeat Dilapida- 'tions of Ecclesiastical Livings, and for Leases to be granted by Collegiate 'Churches*, there is one branch to avoid certain leases to be made by masters 'and fellows of colleges, deans, and chapters of cathedral or collegiate 'churches, masters or guardians of any hospital, or by any parson, vicar or 'any other, having any spiritual or ecclesiastical living;' Be it enacted, that the said branch, nor any thing therein contained, shall not extend to any grant, assurance, or lease of any houses belonging to any the persons or bo- dies polititick or corporate aforesaid, nor to any grounds to such houses ap- pertaining, which houses be situate in any city, borough, town corporate or market-town, or the suburbs of any of them, but that all such houses and grounds may be granted, demised and assured, as by the laws of this realm, and the several statutes of the said colleges, cathedral churches and hospi- tals, they lawfully might have been before the making of the said statute, or lawfully might be if the said statute were not; so always that such house be not the capital or dwelling-house used for the habitation of the persons aforesaid, not have ground to the same belonging above the quan- tity of ten acres; any thing in the said act to the contrary notwithstanding.

XVIII. And be it further enacted, that all sums of money hereafter to be recovered, for or in name of dilapidations, by sentence, composition or

otherwise, shall within two years after such receipt be truly imployed upon the buildings and reparations, in respect whereof such money for dilapidations shall be paid; on pain that every person so receiving and not imploying as aforesaid, shall forfeit double as much as so shall be by him received and not imployed; the which forfeiture shall be to the use of the queen's majesty, her heirs and successors.

XIX. Provided always, and be it enacted, that no lease shall be permitted to be made by force of this act, in reversion, nor without reserving the accustomed yearly rent at the least, nor without charging the lessee with the reparations, nor for longer term than forty years at the most; nor any houses shall be permitted to be aliened, unless that in recompence thereof there shall be afore, with or presently after such alienation, good, lawful and sufficient assurance made in fee-simple absolutely to such colleges, houses, bodies politick or corporate, and their successors, of lands of as good value, and of as great yearly value at the least, as so shall be aliened; any statute to the contrary notwithstanding.

XX. 'And forasmuch as all the same several acts and statutes and every 'of them do seem good, beneficial and needful to be further continued, for 'the weal and profit of this realm,' Be it therefore now enacted, by the queen's most excellent majesty, with the assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, that the same several acts and statutes and every of them, and all and every article, clause and sentences, in them and every of them contained, shall continue, be and indure in full force and effect until the end of the next parliament. 39 El. c. 18.

No. XXXI.—P. 169.

22 and 23 Car. II. c. 15. A. D. 1670.

An Act for the better Settlement of the Maintenance of the Parsons, Vicars, and Curates, in the Parishes of the City of London, *burnt by the late dreadful fire there.*

'Whereas the tithes in the city of *London* were levied and paid with 'great inequality, and are since the late dreadful fire there, in the re-'building of the same, by taking away of some houses, altering the foun-'dations of many, and the new erecting of others, so disordered, that in 'case they should not for the time to come be reduced to a certainty, many 'controversies and suits of law might thence arise:' be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, that the annual certain tithes of all and every parish and parishes within the said city of *London*, and the liberties thereof, whose churches have been demolished, or in part consumed by the late fire, and which said parishes by virtue of an act of this present parliament, intituled, *An additional act for the rebuilding of the city of* London, *uniting of parishes, and re-building of the cathedral and parochial churches within the said city*, remain and continue single, as heretofore they were, or are by the said act annexed or united into one parish respectively, shall be as followeth: (that is to say,) the annual certain tithes, or sum of money in lieu of tithes.

II. 1. Of the parish of *Alhallows, Lumbard-street*, one hundred and ten pounds, cx *l.*

2. Of St. *Bartholomew Exchange*, one hundred pounds, c *l.*

3. Of St. *Bridget*, alias *Bride*, one hundred and twenty pounds, cxx *l.*

4. Of St. *Bennet Finck*, one hundred pounds, c *l.*
5. Of St. *Michael, Crooked-lane*, one hundred pounds, c *l.*
6. Of St. *Christopher*, one hundred and twenty pounds, cxx *l.*
7. Of St. *Dionis Backchurch*, one hundred and twenty pounds, cxx *l.*
8. Of St. *Dunstan* in the east, two hundred pounds, cc *l.*
9. Of St. *James Garlick Hythe*, one hundred pounds, c *l.*
10. Of St. *Michael, Cornhill*, one hundred and forty pounds, cxl *l.*
11. Of St. *Michael, Bassishaw*, one hundred thirty and two pounds and eleven shillings, cxxxii *l.* xi *s.*
12. Of St. *Margaret, Lothbury*, one hundred pounds, c *l.*
13. Of St. *Mary, Aldermanbury*, one hundred and fifty pounds, cl *l.*
14. Of St. *Martin, Ludgate*, one hundred and sixty pounds, clx *l.*
15. Of St. *Peter, Cornhill*, one hundred and ten pounds, cx *l.*
16. Of St. *Stephen, Coleman-street*, one hundred and ten pounds, cx *l.*
17. Of St. *Sepulchre*, two hundred pounds, cc *l.*
18. Of *Alhallows, Bread-street*, and St. *John Evangelist*, one hundred and forty pounds, cxl *l.*
19. Of *Alhallows the Great*, and *Alhallows the Less*, two hundred pounds, cc *l.*
20. Of St. *Alban, Wood-street*, and St. *Olaves, Silver-street*, one hundred and seventy pounds, clxx *l.*
21. Of St. *Anne* and *Agnes*, and St. *John Zachary*, one hundred and forty pounds, cxl *l.*
22. Of St. *Augustine* and St. *Faith*, one hundred seventy and two pounds, clxxii *l.*
23. Of St. *Andrew, Wardrobe*, and St. *Anne, Blackfryers*, one hundred and forty pounds, cxl *l.*
24. Of St. *Antholin*, and St. *John Baptist*, one hundred and twenty pounds, cxx *l.*
25. Of St. *Bennet, Gracechurch*, and St. *Leonard, Eastcheap*, one hundred and forty pounds, cxl *l.*
26. Of St. *Bennet, Paul's-wharf*, and St. *Peters, Paul's-wharf*, one hundred pounds, c *l.*
27. Of *Christ Church*, and St. *Leonard, Foster-lane*, two hundred pounds, cc *l.*
28. Of St. *Edmond the King*, and St. *Nicholas Acons*, one hundred and eighty pounds, clxxx *l.*
29. Of St. *George, Botolph-lane*, and St. *Botolph, Billingsgate*, one hundred and eighty pounds, clxxx *l.*
30. Of St. *Lawrence, Jewry*, and St. *Magdalen, Milk-street*, one hundred and twenty pounds, cxx *l.*
31. Of St. *Magnus*, and St. *Margaret, New Fish-street*, one hundred and seventy pounds, clxx *l.*
32. Of St. *Michael Royal*, and St. *Martin Vintry*, one hundred and forty pounds, cxl *l.*
33. Of St. *Matthew, Friday-street*, and St. *Peter, Cheap*, one hundred and fifty pounds, cl *l.*
34. Of St. *Margaret, Pattons*, and St. *Gabriel, Fenchurch*, one hundred and twenty pounds, cxx *l.*
35. Of St. *Mary at Hill*, and St. *Andrew Hubbard*, two hundred pounds, cc *l.*
36. Of St. *Mary Woolnoth*, and St. *Mary Woolchurch*, one hundred and sixty pounds, clx *l.*

37. Of St. *Clement, Eastcheap*, and St. *Martin Orgars*, one hundred and forty pounds, cxl *l.*

38. Of St. *Mary, Abchurch*, and St. *Lawrence, Pountney*, one hundred and twenty pounds, cxx *l.*

39. Of St. *Mary, Aldermary*, and St. *Thomas Apostles*, one hundred and fifty pounds, cl *l.*

40. Of St. *Mary le Bow*, St. *Pancras, Soper-lane*, and *Alhallows, Honey-lane*, two hundred pounds, cc *l.*

41. Of St. *Mildred, Poultry*, and St. *Mary, Cole Church*, one hundred and seventy pounds, clxx *l.*

42. Of St. *Michael, Wood-street*, and St. *Mary, Staining*, one hundred pounds, c *l.*

43. Of St. *Mildred, Bread-street*, and St. *Margaret, Moses*, one hundred and thirty pounds, cxxx *l.*

44. Of St. *Michael, Queenhyth*, and *Trinity*, one hundred and sixty pounds, clx *l.*

45. Of St. *Magdalen, Old Fish-street*, and St. *Gregory*, one hundred and twenty pounds, cxx *l.*

46. Of St. *Mary, Somerset*, and St. *Mary, Mounthaw*, one hundred and ten pounds, cx *l.*

47. Of St. *Nicholas, Cole Abby*, and St. *Nicholas, Olaves*, one hundred and thirty pounds, cxxx *l.*

48. Of St. *Olave, Jewry*, and St. *Martin, Ironmonger-lane*, one hundred and twenty pounds, cxx *l.*

49. Of St. *Stephen, Walbrook*, and St. *Bennet, Sheerhogg*, one hundred pounds, c *l.*

50. Of St. *Swythin*, and St. *Mary, Bothaw*, one hundred and forty pounds, clx *l.*

51. Of St. *Vedast*, alias *Fosters*, and St. *Michael, Quern*, one hundred and sixty pounds, clx *l.*

III. Which respective sums of money to be paid in lieu of tithes within the said respective parishes, and assessed as herein-after is directed, shall be, and continue to be esteemed, deemed, and taken, to all intents and purposes, to be the respective certain annual maintenance (over and above glebes and perquisites, gifts and bequests, to the respective parson, vicar, and curate, of any parish for the time being, or to his or their respective successors, or to other persons for his or their use) of the said respective parsons, vicars, and curates, who shall be legally instituted, inducted, and admitted into the respective parishes aforesaid.

IV. And that the said several sums of money for tithes, may be more equally assessed upon the several houses, buildings, and all other hereditaments whatsoever, within all the said respective parishes; be it enacted by the authority aforesaid, that the alderman of such respective ward or wards within the said city, wherein any of the said parishes respectively lie, and his or their deputy or deputies, and the common council-men of such respective ward or wards, with the churchwardens, and one or more of the parishioners of such respective parish, wherein the maintenance aforesaid is respectively to be assessed, to be nominated by such respective alderman, deputy, common-councilmen, and churchwardens, or any five of them, whereof the alderman or his deputy to be one, shall at some convenient and seasonable time before the twentieth day of May, in the year of our Lord God one thousand six hundred and seventy-one, assemble and meet together in some convenient place within every of the respective parishes, in such respective ward wherein the maintenance aforesaid is to be assessed;

and they or the major part of them so assembled, shall proportionably assess upon all houses, shops, warehouses, and cellars, wharfs, keys, cranes, water-houses, (which water-houses shall pay in their respective parishes where they stand, and not elsewhere,) and tofts of ground, (remaining unbuilt,) and all other hereditaments whatsoever, (except parsonage and vicarage houses,) the whole respective sum by this act appointed, or so much of it as is more than what each impropriator is by this act enjoyned respectively to allow, in the most equal way that the said assessors, according to the best of their judgments, can make it; which said assessments shall be made and finished before the four and twentieth day of July then next ensuing.

V. And be it further enacted by the authority aforesaid, that if any variance or doubt shall happen or arise about any sum so assessed as aforesaid, or that any parishioner or parishioners, or owner or owners of any house, shop, warehouse, or cellar, wharf, key, crane, water-house, toft of ground, or other hereditament within any of the said parishes, shall find himself or themselves aggrieved by the assessing of any sum or sums of money, in manner and form aforesaid, that then upon complaint made by the party or parties aggrieved, to the lord mayor and court of aldermen of the said city, within fourteen days after notice given to the party or parties assessed, of such assessment made, the said lord mayor and court of aldermen summoning as well the party or parties aggrieved, as the alderman and such others as made the said assessment, shall hear and determine the same in a summary way, and the judgment by them given shall be final, and without appeal.

VI. Provided always, and be it enacted, that any assessment or rate to be made or laid by virtue of this act, shall or may in all or any the parishes aforesaid, in like manner, be reviewed, or altered, or laid again within three months after the twenty-fourth day of June one thousand six hundred and seventy-four, according to the aforesaid rules, and any such assessment or rate shall or may be again reviewed, or re-assessed, within three months after the twenty-fourth day of June, in the year of our Lord one thousand six hundred eighty-one; and that all and every such new assessment and rate shall be liable to the like appeals, as aforesaid, and shall be collected, levied, and paid, as any other assessment or rate mentioned in this act, may or ought to be.

VII. And if the said alderman, deputy, common-councilmen, and parishioner or parishioners so appointed as aforesaid, shall, after summons and request made in that behalf unto them, by the lord mayor and court of aldermen, or the incumbent or incumbents of any of the said respective parish or parishes, refuse and neglect to meet and make such assessments as aforesaid, then it shall and may be lawful to and for such person or persons as shall be thereunto authorized and required by the said lord mayor and court of aldermen, to make such assessment, as by the said aldermen, deputy, common-councilmen, churchwardens, parishioner or parishioners aforesaid, should or ought to have been made.

VIII. And be it further enacted by the authority aforesaid, that the said assessors within ten days after such assessments made, and the respective appeals (if any be) determined, shall make three transcripts thereof in parchment, containing the respective sums to be payable, or appointed to be paid out of all and every the premises within such respective parish, and subscribe the same under their hands, and within twenty days after such subscription, as aforesaid, one of the said transcripts shall be returned to the lord mayor of the city of *London*, to be kept and preserved by the said

lord mayor, in and among the records of the said city, for a perpetual memorial thereof; and another of the said transcripts shall be returned into the registry of the lord bishop of *London*, to be kept and preserved, as aforesaid; and the other of the said transcripts shall remain and be kept in the vestry of such respective parish, for a perpetual memorial, as aforesaid.

IX. And for the surer and better payment of the said respective sums of money so to be assessed and taxed towards the raising of the said maintenance of the respective parsons, vicars, and curates of the said respective parishes, as aforesaid: be it further enacted by the authority aforesaid, that all and every such respective sum and sums of money so to be assessed and taxed, as aforesaid, towards the raising of the said maintenance of the said respective parsons, vicars, and curates, of the said respective parishes, shall be paid to the said respective parsons, vicars, and curates, and their successors respectively, at the four most usual feasts, (that is to say,) at the annunciation of the blessed virgin *Mary*, the nativity of St. *John Baptist*, the feast of St. *Michael* the archangel, and the nativity of our Blessed Saviour, or within fourteen days after each of the feasts aforesaid, by equal payments; the respective payments thereof to begin and commence only from such time and times as the incumbent or incumbents of such respective parish shall begin to officiate or preach as incumbent or parson in the respective church belonging to such respective parish, or in some other convenient place or places in such respective parish or parishes, to be nominated or appointed by the lord bishop of *London* for the time being, or by the archbishop of *Canterbury*, in any place within his peculiars.

X. And in any parish or parishes where any impropriations be, be it enacted by the authority aforesaid, that all and every the impropriator or impropriators of any of the said parishes, shall pay and allow what *really* and *bona fide* they have used, and ought to pay and satisfie to the respective incumbent of such respective parish, at any time before the said late fire, and the same shall be esteemed and computed as part of the maintenance of such incumbent; notwithstanding this act, or any clause or matter, or thing therein contained.

XI. And be it further enacted by the authority aforesaid, that if any the inhabitants in any respective parish or parishes as aforesaid, shall or do refuse or neglect to pay to the respective incumbents aforesaid, of any of the said respective parishes, any sum or sums of money to him respectively payable, or appointed to be paid by this act, or any part thereof, contrary to the true intent and meaning of this act, (being lawfully demanded at the house or houses, wharf, key, crane, cellar, or other premises, whereout the same is payable,) that then it shall and may be lawful to and for the lord mayor of the city of *London* for the time being, upon oath to be made before him of such refusal or neglect, to give and grant out warrants for the officer or person appointed to collect the same, with the assistance of a constable in the day-time, to levy the same tithes or sums of money so due, and in arrear and unpaid, by distress and sale of the goods of the party or parties so refusing or neglecting to pay, restoring to the owner or owners the overplus of such goods, over and above the said arrears of the said monies so due and unpaid, and the reasonable charges of making such distress, which he is to deduct out of the monies raised by sale of such goods.

XII. Provided always, and be it enacted, that in case the lord mayor, or court of aldermen, shall refuse or neglect to execute any of the respective powers to them by this act granted, or to perform all and every such thing relating either to the assessing or levying of the respective sums afore-

said, as they are by this act authorized and required to perform, that then it shall and may be lawful for the lord chancellour, or lord keeper of the great seal of *England* for the time being, or any two or more of the barons of his majesty's court of exchequer, by warrant or warrants under his or their respective hands and seals, to do and perform what the said lord mayor and court of aldermen, according to the true intent and meaning of this present act, might or ought to have done, and by such warrant, either to impower any person or persons to make the respective assessments as aforesaid, or to authorize the respective officers or persons appointed to collect the sums aforesaid, to levy the same by distress and sale of the goods of any person or persons that shall refuse or neglect to pay the same, in manner and form aforesaid.

XIII. Provided always, and be it enacted, that where any of the parishes within the said city have, since the late fire, by death or otherwise, become vacant, the surviving or remaining incumbent of the other parish thereto united, or therewith consolidated, shall have and enjoy, and have like remedy to recover the tithes hereby settled to be paid, as if he had been actually presented, admitted, instituted, and inducted, into both the said parishes, since union and consolidation thereof.

XIV. Provided always, that no court or judge ecclesiastical or temporal, shall hold plea of or for any the sum or sums of money due and owing, or to be paid by virtue of this act, or any part thereof, other than the persons hereby authorized to have cognizance thereof; nor shall it be lawful to or for any parson, vicar, curate, or incumbent, to convent or sue any person or persons assessed as aforesaid, and refusing or neglecting to pay the same in any court or courts, or before any judge or judges, other than what are authorized and appointed by this act, for the hearing and determining of the same, in manner aforesaid.

XV. Provided always, that it shall and may be lawful to and for the warden and minor canons of Saint *Paul's* church *London*, parson and proprietors of the rectory of Saint *Gregory* aforesaid, to receive and enjoy all tithes, oblations, and duties, arising or growing due within the said parish, in as large and beneficial manner as formerly they have, or lawfully might have done; any thing herein to the contrary notwithstanding.

No. XXXII.—P. 170.

3 Wm. III. chap. 3. A. D. 1691.

An Act for the better ascertaining the Tithes of Hemp and Flax.

Whereas the sowing of hemp and flax would be exceeding beneficial to *England*, by reason of the multitude of people that are and would be employed in the manufacturing of those two materials, and therefore do justly deserve great encouragement: And whereas the manner of tithing hemp and flax is exceeding difficult, creating thereby many grievous, chargeable, and vexatious suits and animosities, between parsons, vicars, impropriators, and their parishioners, for remedying whereof,

II. Be it enacted by the king's and queen's most excellent majesties, by and with the advice and consent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, that from and after the second day of February, which shall be in the year of our Lord one thousand six hundred and ninety-one, all, and all manner of persons that shall sow or cause to be sown any hemp or flax, in any parish or place in the kingdom of *England*, dominion of *Wales*, and

town of *Berwick-upon-Tweed*, shall pay or cause to be paid to every parson, vicar, or impropriator of any such parish or place, yearly and every year, for each acre of hemp, or flax so sown, pulled, or drawn, a constant annual sum of money not exceeding four shillings, before the same be carried off the ground, and so proportionably for more or less ground so sown, and pulled, or drawn, as aforesaid; for the recovery of which sum or sums of money, the parson, vicar, or impropriator, shall have the common and usual remedy allowed of by the laws of *England*.

III. Provided, that this act, or any thing therein contained, shall not extend to charge any lands discharged by any *modus decimandi*, ancient composition, or otherwise discharged of tithes by law.

IV. Provided, that this law shall continue for seven years, and to the end of the next session of parliament, after the said seven years are expired.

No. XXXIII.—P. 170.

7 and 8 William III. c. 6.

An Act for the more easy Recovery of small Tithes.

For the more easy and effectual recovery of small tithes, and the value of them, where the same shall be unduly substracted and detained; where the same do not amount to above the yearly value of forty shillings from any one person: be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that all and every person and persons shall henceforth well and truly set out and pay all and singular the tithes, commonly called *small tithes*, and compositions and agreements for the same, with all offerings, oblations, and obventions, to the several rectors, vicars, and other persons, to whom they are or shall be due, in their several parishes within this kingdom of *England*, dominion of *Wales*, and town of *Berwick* upon *Tweed*, according to the rights, customs, and prescriptions commonly used within the said parishes respectively; and if any person or persons shall hereafter substract or withdraw, or any ways fail in the true payment of such small tithes, offerings, oblations, obventions, or compositions as aforesaid, by the space of twenty days at most after demand thereof, then it shall and may be lawful for the person or persons, to whom the same shall be due, to make his or their complaint in writing unto two or more of his majesty's justices of the peace within that county, riding, city, town corporate, place or division where the same shall grow due; neither of which justices of peace is to be patron of the church or chapel whence the said tithes do or shall arise, nor any ways interested in such tithes, offerings, oblations, obventions, or compositions aforesaid.

II. And be it further enacted by the authority aforesaid, that if hereafter any suit or complaint shall be brought to two or more justices of the peace as aforesaid, concerning small tithes, offerings, oblations, obventions, or compositions as aforesaid, the said justices are hereby authorized and required to summon in writing under their hands and seals, by reasonable warning, every such person or persons against whom any complaint shall be made as aforesaid: and after his or their appearance, or upon default of their appearance, the said warning or summons being proved before them upon oath, the said justices of peace, or any two or more of them, shall proceed to hear and determine the said complaint, and upon the proofs, evidences and testimonies, produced before them, shall, in writing under

their hands and seals, adjudge the case, and give such reasonable allowance and compensation for such tithes, oblations, and compositions so substracted or withheld, as they shall judge to be just and reasonable, and also such costs and charges, not exceeding ten shillings, as upon the merits of the cause shall appear just.

III. And be it further enacted, that if any person or persons shall refuse or neglect, by the space of ten days after notice given, to pay or satisfy any such sum of money, as upon such complaint and proceeding shall by two or more justices of the peace be adjudged as aforesaid, in every such case the constables and churchwardens of the said parish, or one of them, shall, by warrant under the hands and seals of the said justices to them directed, distrain the goods and chattels of the party so refusing or neglecting as aforesaid, and after detaining them by the space of three days, in case the said sum so adjudged to be paid, together with reasonable charges for making and detaining the said distress, be not tendred or paid by the said party in the mean time, shall and may make public sale of the same, and pay to the party complaining so much of the money arising by such sale as may satisfy the said sum so adjudged, retaining to themselves such reasonable charges for making and keeping the said distress, as the said justice shall think fit, and shall render the overplus (if any be) to the owner.

IV. Provided always, and be it enacted, that it shall and may be lawful for all justices of peace, in the examination of all matters offered to them by this act, to administer an oath or oaths to any witness or witnesses where the same shall be necessary for their information, and for the better discovery of the truth.

V. Provided also, and be it enacted, that this act, or any thing herein contained, shall not extend to any tithes, oblations, payments, or obventions, within the city of *London*, or liberties thereof, nor to any other city or town corporate where the same are settled by any act of parliament in that case particularly made and provided.

VI. Provided also, and be it enacted, that no complaint for or concerning any small tithes, offerings, oblations, obventions, or compositions hereafter due, shall be heard and determined by any justices of the peace, by virtue of this act, unless the complaint shall be made within the space of two years next after the times that the same tithes, oblations, obventions, and compositions did become due or payable; any thing in this act contained to the contrary notwithstanding.

VII. Provided also, and be it enacted, that any person finding himself, herself, or themselves aggrieved, by any judgment to be given by any two justices of the peace, shall and may appeal to the next general quarter sessions to be held for that county, riding, city, town corporate or division, and the justices of the peace there present, or the major part of them, shall proceed finally to hear and determine the matter, and to reverse the said judgment, if they shall see cause; and if the justices then present, or the major part of them, shall find cause to confirm the judgment given by the first two justices of the peace, they shall then decree the same by order of sessions, and shall also proceed to give such costs against the appellant, to be levied by distress and sale of the goods and chattels of the said appellant, as to them shall seem just and reasonable; and no proceedings, or judgment had, or to be had by virtue of this act, shall be removed or superseded by virtue of any writ of *Certiorari*, or other writ out of his majesty's courts, at *Westminster*, or any other court whatsoever, unless the title of such tithes, ob-

lations, or obventions, shall be in question; any law, statute, custom, or usage to the contrary notwithstanding.

VIII. Provided always, and be it enacted, that where any person or persons complained of for substracting or withholding any small tithes, or other duties aforesaid, shall before the justices of the peace to whom such complaint is made, insist upon any prescription, composition, or *modus decimandi*, agreement, or title, whereby he or she is or ought to be freed from payment of the said tithes, or other dues in question, and deliver the same in writing to the said justices of the peace, subscribed by him or her, and shall then give to the party complaining reasonable and sufficient security, to the satisfaction of the said justices, to pay all such costs and damages, as upon a trial at law to be had for that purpose, in any of his majesty's courts having cognizance of that matter, shall be given against him, her or them, in case the said prescription, composition, or *modus decimandi*, shall not upon the said trial be allowed; that in that case the said justices of the peace shall forbear to give any judgment in the matter; and that then and in such case the person or persons so complaining, shall, and may be at liberty to prosecute such person or persons for their said substraction in any other court or courts whatsoever, where he, she, or they might have sued before the making of this act; any thing in this act to the contrary notwithstanding.

IX. And be it further enacted by the authority aforesaid, that every person or persons, who shall by virtue of this act obtain any judgment, or against whom any judgment shall be obtained, before any justices of the peace out of sessions, for small tithes, oblations, obventions, or compositions, shall cause or procure the said judgment to be inrolled at the next general quarter sessions to be holden for the said county, city, riding, or division; and the clerk of the peace for the said county, city, riding, or division is hereby required upon tender thereof, to inroll the same; and that he shall not ask or receive for the inrollment of any one judgment any fee or reward exceeding one shilling; and that the judgment so inrolled, and satisfaction made by paying the same sum so adjudged, shall be a good bar to conclude the said rectors, vicars, and other persons, from any other remedy for the said small tithes, oblations, obventions, or compositions, for which the said judgment was obtained.

X. And be it further enacted by the authority aforesaid, that if any person or persons, against whom any such judgment or judgments shall be had as aforesaid, shall remove out of the county, riding, city, or corporation, after judgment had as aforesaid, and before the levying the sum or sums thereby adjudged to be levied, the justices of the peace who made the said judgment, or one of them, shall certify the same, under his or their hands and seals, to any justice of peace of such other county, city, or place, wherein the said person or persons shall be inhabitants; which said justice is hereby authorized and required, by warrant under his hand and seal, to be directed to the constables or churchwardens of the place, or one of them, to levy the sum or sums so adjudged to be levied, as aforesaid, upon the goods and chattels of such person or persons, as fully as the said other justices might have done, if he, she, or they had not removed as aforesaid; which shall be paid according to the said judgment.

XI. Provided always, and be it enacted, that no vicar or other person shall have remedy to recover small tithes, or other dues aforesaid, which became or were due before the making of this act, unless complaint be made to the justices of the peace in form aforesaid, before the first day of

October, which shall be in the year of our Lord one thousand six hundred and ninety-six.

XII. And it is hereby declared and enacted, that the said justices of the peace, who shall hear and determine any of the matters aforesaid, shall have power to give costs, not exceeding ten shillings, to the party prosecuted, if they shall find the complaint to be false and vexatious; which costs shall be levied in manner and form aforesaid.

XIII. Provided also, and be it further enacted, that if any person or persons shall be sued for any thing done in execution of this act, and the plaintiff in such suit shall discontinue his action, or be non-suit, or a verdict pass against him, that then, in any of the said cases, such person or persons shall recover double costs.

XIV. Provided always, that any clerk, or other person or persons, who shall begin any suit for recovery of small tithes, oblations, or obventions, not exceeding the value of forty shillings, in his majesty's courts of exchequer, or in any of the ecclesiastical courts, shall have no benefit by this act, or any clause in it, for the same matter for which he or they have so sued.

XV. Provided always, and be it further enacted, that this act shall continue for the space of three years, and from thence to the end of the next session of parliament, and no longer. [Made perpetual 3 Ann. c. 18.]

No. XXXIV.—P. 170.

7 and 8 Gul. III. c. 34. A. D. 1696.

An Act that the solemn Affirmation and Declaration of the People called Quakers, *shall be accepted instead of an Oath in the usual Form.*

'Whereas divers dissenters, commonly called quakers, refusing to take 'an oath in courts of justice and other places, are frequently imprisoned, 'and their estates sequestred, by process of contempt issuing out of such 'courts, to the ruin of themselves and families:' for remedy thereof be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the fourth day of May, which shall be in the year of our Lord one thousand six hundred ninety six, every quaker within this kingdom of *England*, dominion of *Wales*, or town of *Berwick* upon *Tweed*, who shall be required upon any lawful occasion to take an oath, in any case where by law an oath is required, shall, instead of the usual form, be permitted to make his or her solemn affirmation or declaration in these words following, viz.

'I. *A. B.* do declare, in the presence of Almighty God, the witness of the 'truth of what I say.'

II. Which said solemn affirmation or declaration shall be adjudged and taken, and is hereby enacted and declared to be, of the same force and effect to all intents and purposes, in all courts of justice and other places where by law an oath is required within this kingdom of *England*, dominion of *Wales*, or town of *Berwick* upon *Tweed*, as if such quaker had taken an oath in the usual form.

III. And be it further enacted by the authority aforesaid, that if any quaker, making such solemn affirmation or declaration, shall be lawfully convicted, wilfully, falsly, and corruptly to have affirmed or declared any matter or thing, which, if the same had been in the usual form, would have amounted to wilful and corrupt perjury; every such quaker so of-

fending shall incur the same penalties and forfeitures, as by the laws and statutes of this realm are enacted against persons convicted of wilful and corrupt perjury.

'IV. And whereas by reason of a pretended scruple of conscience, quakers do refuse to pay tithes and church rates;' be it enacted by the authority aforesaid, that where any quaker shall refuse to pay or compound for his great or small tithes, or to pay any church rates, it shall and may be lawful to and for the two next justices of the peace of the same county (other than such justice of peace as is patron of the church or chapel, whence the said tithes do or shall arise, or any ways interested in the same tithes) upon the complaint of any parson, vicar, farmer, or proprietor of tithes, churchwarden or churchwardens, who ought to have, receive, or collect the same, by warrant under their hands and seals, to convene before them such quaker or quakers neglecting or refusing to pay or compound for the same, and to examine upon oath (which oath the said justices are hereby impowered to administer) or in such manner as by this act is provided, the truth and justice of the said complaint, and to ascertain and state what is due and payable by such quaker or quakers to the party or parties complaining, and by order under their hands and seals, to direct and appoint the payment thereof, so as the sum ordered, as aforesaid, do not exceed ten pounds; and upon refusal by such quaker or quakers to pay according to such order, it shall and may be lawful to and for any one of the said justices, by warrant under his hand and seal, to levy the money thereby ordered to be paid, by distress and sale of the goods of such offender, his executors and administrators, rendering only the overplus to him, her, or them, necessary charges of distraining being thereout first deducted and allowed by the said justice; and any person finding him, her, or themselves aggrieved by any judgment given by such two justices of the peace, shall and may appeal to the next general quarter sessions to be held for the county, riding, city, liberty, or town corporate; and the justices of the peace there present, or the major part of them, shall proceed finally to hear and determine the matter, and to reverse the said judgment, if they shall see cause; and if the justices then present, or the major part of them, shall find cause to continue the judgment given by the first two justices of the peace, they shall then decree the same by order of sessions, and shall also proceed to give such costs against the appellant, to be levied by distress and sale of the goods and chattels of the said appellant, as to them shall seem just and reasonable; and no proceedings or judgment had or to be had by virtue of this act shall be removed or superseded by any writ of *Certiorari*, or other writ out of his majesty's courts at *Westminster*, or any other court whatsoever, unless the title of such tithes shall be in question.

V. Provided always, that in case any such appeal be made as aforesaid, no warrant of distress shall be granted until after such appeal be determined.

VI. Provided, and be it enacted, that no quaker or reputed quaker shall by virtue of this act be qualified or permitted to give evidence in any criminal causes, or serve on any juries, or bear any office or place of profit in the government; any thing in this act contained to the contrary in any wise notwithstanding.

VII. Provided, that this act shall continue in force for the space of seven years, and from thence to the end of the next session of parliament, and no longer.

No. XXXV.—P. 170.

11 and 12 William III. c. 16.

An Act for the better Ascertaining the Tithes of Hemp and Flax.

Whereas an act made in the third year of the reign of his majesty and the late queen, intituled, *An Act for the better Ascertaining the Tithes of Hemp and Flax*, was made to continue but for seven years, and to the end of the next session of parliament after such term ended, and is now expired: and whereas the said act hath by experience been found very useful and necessary; be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present parliament assembled; and by the authority of the same, that from and after the five and twentieth day of March, which shall be in the year of our Lord seventeen hundred, all and every person or persons who shall sow or cause to be sown any hemp or flax in any parish or place in the kingdom of *England*, dominion of *Wales*, and town of *Berwick* upon *Tweed*, shall pay or cause to be paid to every parson, vicar, or impropriator of any such parish or place, yearly and every year, the sum of five shillings, and no more, for each acre of hemp and flax so sown, before the same be carried off the ground, and so proportionably for more or less ground so sown; for the recovery of which sum or sums of money, the parson, vicar, or impropriator, shall have the common and usual remedy allowed of by the laws of the land.

II. Provided, that this act or any thing therein contained, shall not extend to charge any lands discharged by any *modus decimandi*, ancient composition, or otherwise discharged of tithes by law.

III. Provided always, that nothing herein contained shall extend, or be construed to extend to make any alteration in the right or manner of payment of tithes of flax and hemp to any ecclesiastical person, incumbent of any parsonage, vicarage, or curacy, or to any impropriator or body corporate having or holding any impropriation, for such ground, as hath at any time since the second day of February 1684, and before the second day of February 1691, been sown with flax or hemp, and paid tithe in kind to such incumbent, impropriator, or body corporate respectively, but that the same shall continue and be payable and paid, as fully, and in such manner as formerly; any thing in this act to the contrary notwithstanding.

IV. Provided, That this law shall continue in force for seven years, to be accounted from the said five and twentieth day of March, and from thence to the end of the next sessions of parliament and no longer.

No. XXXVI.—P. 170.

2d Sect. of 1 Geo. I. Stat. 2. c. 26.

An Act for continuing several Laws therein mentioned relating to Coals, Hemp and Flax, Irish and Scotch Linen, &c.

Sect. II. And be it further enacted by the authority aforesaid, that an act made in the session of parliament, held in the eleventh and twelfth years of his late majesty king *William* III. intituled, *An Act for the better ascertaining the Tithes of Hemp and Flax*, which was to continue for seven years, and from thence to the end of the next session of parliament; which act was further continued by an act made in the sixth year of her said late majesty queen *Anne*, for seven years, from the expiration thereof; which act was further continued by an act made in the first year of his pre-

sent majesty king *George*, and will expire at the end of this present session of parliament, shall be made perpetual.

No. XXXVII.—P. 170.

For the two acts concerning the tithes of Madder, see Appendix, No. V.

No. XXXVIII.—P. 170.

43 Geo. III. c. 84. A. D. 1803.

An Act to amend the Laws relating to Spiritual Persons holding of Farms, and for Enforcing the Residence of Spiritual Persons on their Benefices in England

X. And be it further enacted, that an act made in the thirteenth year of the reign of queen *Elizabeth*, intituled, An Act *touching Leases of Benefices, and other Ecclesiastical Livings with Cure*, together with all and every explanations, additions, and alterations thereof, made by several statutes in the 14th, 18th, and 43d years of her said majesty's reign, and also so much of an act made in the third year of the reign of king Car. I. intituled, *an act for continuance and repeal of divers statutes*, whereby the same were made perpetual, be from henceforth repealed.

No. XXXIX.—P. 170.

43 George III. c. 107. A. D. 1803.

An Act for effectuating certain Parts of an Act, passed in the second and third Years of the Reign of her late Majesty Queen Anne, *intituled,* An Act for the making more effectual her Majesty's gracious Intentions for the Augmentation of the Maintenance of the Poor Clergy, by enabling her Majesty to grant in Perpetuity, the Revenues of the First Fruits and Tenths; and also for enabling any other Persons to make Grants for the same Purpose, *so far as the same relate to Deeds and Wills made for granting and bequeathing Lands, Tenements, Hereditaments, Goods, and Chattels, to the Governors of the Bounty of Queen* Anne, *for the Purposes in the said Act mentioned, and for enlarging the Powers of the said Governors.*

'Whereas by an act, made in the second and third years of the reign of 'her late majesty queen *Anne*, intituled, *An Act for the making more effec-* 'tual her Majesty's gracious Intentions for the Augmentation of the Mainte- 'nance of the Poor Clergy, by enabling her Majesty to grant, in Perpetuity, 'the Revenues of the First Fruits and Tenths; and also for enabling any other 'Persons to make Grants for the same Purpose;* after reciting amongst other 'things, that for the encouragement of such well-disposed persons as 'should, by her majesty's royal example, be moved to contribute to so 'pious and charitable a purpose, and that such their charity might be 'rightly applied, it was amongst other things enacted, that all and every 'person and persons having in his or their own right any estate or interest, 'in possession, reversion, or contingency, of or in any lands, tenements, 'or hereditaments, or any property of or in any goods or chattels, should 'have full power, licence, and authority, at his, her, and their will and 'pleasure, by deed enrolled in such manner and within such time as is di- 'rected by the statute made in the twenty-seventh year of the reign of king 'Henry the Eighth, for enrolment of bargains and sales, or by his, her, or 'their last will and testament in writing, duly executed according to law, to 'give and grant to and vest in the corporation thereby authorised, and 'since erected under the name of *The Governors of the Bounty of Queen*

'Anne, and their successors, all such his, her, or their estate, interest, or 'property in such lands, tenements, and hereditaments, goods, and chat-'tels, or any part or parts thereof, for and towards the augmentation of 'the maintenance of such ministers officiating in such church or chapel 'where the liturgy and rites of the said church were or should be so used 'or observed, as in the same act were mentioned, and having no settled 'competent provision belonging to the same, and to be for that purpose 'applied according to the will of the said benefactor, in and by such deed 'enrolled, or by such will or testament executed as aforesaid expressed, and 'in default of such direction, limitation, or appointment, in such manner 'as by her majesty's letters patent should be directed or appointed as afore-'said; and such corporation and their successors, should have full capacity 'and ability to purchase, receive, take, hold, and enjoy for the purposes 'aforesaid, from such persons as should be so charitably disposed to give 'the same, any manors, lands, tenements, goods, or chattels, without 'any licence or writ of *Ad quod damnum*, the statute of mortmain or any 'other statute or law to the contrary notwithstanding: and it was by the 'same act provided, that that act, or any thing therein contained, shall 'not extend to enable any person or persons being within age, or of non-'sane memory, or women covert without their husbands, to make any 'such gift, grant, or alienation, any thing in that act contained to the con-'trary in any wise notwithstanding: and whereas the beneficial effect and 'operation of the said act have been considerably obstructed and retarded 'by an act, passed in the ninth year of the reign of his late majesty king 'George the Second, intituled, *An Act to restrain the Disposition of Lands 'whereby the same become unalienable*;' for remedy thereof be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that so much of the said act of her late majesty queen *Anne*, as is herein recited, shall be and remain in full force and effect, the said act of his late majesty king *George* the second, or any other act or law to the contrary notwithstanding.

II. 'And whereas by an act, passed in the first year of the reign of his 'late majesty king *George* the first, intituled, *an act for making more ef-'fectual her late majesty's gracious intentions for augmenting the maintenance 'of the poor clergy*, it was amongst other things enacted, that it should be 'lawful, with the concurrence of the said governors of the bounty of queen 'Anne, and the incumbent, patron, and ordinary of any augmented living 'or cure to exchange all or any part of the estate settled for the augmenta-'tion thereof, for any other estate in lands or tithes of equal or greater va-'lue, to be conveyed to the same uses;' be it also enacted, that the said power shall be, and the same is hereby extended to all the messuages, buildings, and lands belonging to every such augmented living or cure.

III. And be it further enacted, that where a living shall have been or shall be augmented by the said governors, either by way of lot or bene-faction, and there is no parsonage house suitable for the residence of the minister, it shall and may be lawful for the said governors, and they are hereby empowered, from time to time, in order to promote the residence of the clergy on their benefices, to apply and dispose of the money appro-priated for such augmentation, and remaining in their hands, or any part thereof, in such manner as they shall deem most adviseable, in or towards the building, rebuilding, or purchasing a house, and other proper erections within the parish, convenient and suitable for the residence of the mi-nister thereof, which house shall for ever thereafter be deemed the par-

sonage house appertaining to such living, to all intents and purposes whatsoever; any thing in any act or acts, or the rules of the said governors contained to the contrary notwithstanding.

CAP. 108.

An Act to promote the building, repairing, or otherwise providing of Churches and Chapels, and of Houses for the Residence of Ministers, and the providing of Church Yards and Glebes. [27th July, 1803.]

'Whereas a sufficient number of churches and chapels for the celebration of divine service, according to the rites and ceremonies of the united church of *England* and *Ireland*, and of mansion houses with competent glebes for the residence of ministers officiating in such churches and chapels, is necessary towards the promotion of religion and morality: and whereas the same are either wholly wanting or materially deficient in many parts of *England* and *Ireland:* and whereas many well disposed persons would be desirous of contributing towards the supply of such defects, if they were enabled so to do in the manner herein-after directed:' may it therefore please your majesty, that it may be enacted; and be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in the present parliament assembled, and by the authority of the same, that all and every person and persons having in his or their own right any estate or interest in possession, reversion, or contingency, of or in any lands or tenements, or of any property of or in any goods or chattels, shall have full power, licence, and authority, at his and their will and pleasure, by deed inrolled in such manner, and within such time, as is directed in *England* by the statute made in the twenty-seventh year of the reign of king *Henry* the eighth, and in *Ireland*, by the statute made in the tenth year of the reign of king *Charles* the first, for inrolment of bargains and sales, or by his, her, or their last will or testament in writing duly executed according to law, such deed, or such will or testament, being duly executed three calendar months at least before the death of such grantor or testator, including the days of the execution and death, to give and grant to and vest in any person or persons, or body politick or corporate, and their heirs and successors respectively, all such his, her, or their estate, interest, or property in such lands or tenements, not exceeding five acres, or goods and chattels, or any part or parts thereof, not exceeding in value five hundred pounds, for or towards the erecting, rebuilding, repairing, purchasing, or providing any church or chapel where the liturgy and rites of the said united church are or shall be used or observed, or any mansion house for the residence of any minister of the said united church, officiating or to officiate in any such church or chapel, or of any out-buildings, offices, church yard, or glebe for the same respectively, and to be for those purposes applied, according to the will of the said benefactor in and by such deed enrolled, or by such will or testament executed as aforesaid expressed, the consent and approbation of the ordinary being first obtained, and in default of such direction, limitation, or appointment, in such manner as shall be directed and appointed by the patron and ordinary, with the consent and approbation of the parson, vicar, or other incumbent; and such person or persons, bodies politick and corporate, and their heirs and successors respectively, shall have full capacity and ability to purchase, receive, take, hold, and enjoy, for the purposes aforesaid, as well from such persons as shall be so charitably disposed to give the same, as from all other persons as shall be willing to sell or aliene to such person or persons, bodies politick or corporate, any lands or tenements, goods, or chattels, without any licence or writ of ad

quod damnum, the statute of Mortmain, or any other statute or law to the contrary notwithstanding: provided always, that this act or any thing therein contained, shall not extend to enable any person or persons being within age, or of non-sane memory, nor women covert without their husbands, to make any such gift, grant, or alienation; any thing in this act contained to the contrary in anywise notwithstanding.

II. Provided always, and it is hereby further enacted, that no more than one such gift or devise shall be made by any one person, and that if any such gift or devise as aforesaid shall happen to exceed five acres in lands or tenements, or the value of five hundred pounds in goods and chattels, every such gift or devise shall be good and valid to the extent aforesaid; and it shall be lawful for the lord chancellor for the time being, on petition, to make order for reducing every such gift or devise to and within the said limits, and for allotting such specifick five acres, and if occasion should require, such specifick goods and chattels as in his judgment shall be most convenient, and to make such further order touching the premises as to him shall appear just and reasonable.

III. Provided also, that no glebe containing upwards of fifty acres shall be augmented with more than one acre under or by virtue of this act, but that the excess, if any, given or devised for the purpose of such augmentation, shall be reduced in manner aforesaid, by the said lord chancellor, and such order thereupon shall be by him made as herein-before is directed in the case of an excess beyond five acres.

'IV. And whereas it often happens that small plots of land held in 'mortmain lie convenient to be annexed to some such church or chapel, 'or house of residence, as aforesaid, or to some church yard, or curtilage 'thereunto belonging, or convenient to be employed as the scite of some 'such church or chapel, or house to be hereafter erected, and for the ne-'cessary and commodious use and enjoyment thereof, and that they might 'be so employed to the advantage of the public, and without detriment to 'the proprietors thereof, if they were enabled to give and grant the same 'for the purposes aforesaid;' be it therefore further enacted, that it shall be lawful for every body politick or corporate, sole or aggregate, by deed inrolled as aforesaid, with or without confirmation, as the law may require, to give and grant, either by way of exchange or benefaction, any such small plot of land not exceeding one acre, to any person or persons, body politick or corporate, his and their heirs and successors respectively, to be held, used, and applied for the purposes aforesaid; and such last-mentioned person and persons, bodies politick and corporate, and their heirs and successors respectively, shall have full capacity and ability, with consent of the incumbent, patron, and ordinary, to take, hold, and enjoy such small plot of land for the purposes aforesaid, without any licence or writ of *ad quod damnum*, the statute of mortmain, or any other act or law to the contrary notwithstanding.

V. Provided also, and it is hereby further enacted and declared, that in every parochial church or chapel hereafter to be erected, ample provision shall be made for the decent and suitable accommodation of all persons of what rank or degree soever, who may be entitled to resort to the same, and whose circumstances may render them unable to pay for such accommodations.

VI. Provided also, that nothing in this act contained shall be construed to take away or abridge any right of giving or devising which already exists in any person whatsoever.

No. XL.—P. 231.

The Charter by which William the Conqueror separated the Spiritual from the Temporal Courts.

Willelmus, dei gratia, rex Anglorum, R. Bainardo, et G. de Magnavilla, et P. de Valoines, cæterisque meis fidelibus de Essex et Hertfordschire et de Middlesex, salutem. Sciatis vos omnes, et cæteri mei fideles qui in Anglia manent, quod episcopales leges, quæ non bene, nec secundum sanctorum canonum præcepta, usque ad mea tempora in regno Anglorum fuerunt, communi concilio, et concilio archiepiscoporum et episcoporum, et abbatum, et omnium principum regni mei, emendandas judicavi. Propterea mando, et regia auctoritate præcipio, ut nullus episcopus, vel archidiaconus, de legibus episcopalibus amplius in Hundret placita teneant; nec causam quæ ad regimen animarum pertinet, ad judicium secularium hominum adducant: sed quicunque secundum episcopales leges, de quacunque causa vel culpa interpellatus fuerit, ad locum quem ad hoc episcopus elegerit et nominaverit, veniat; ibique de causa vel culpa sua respondeat, et non secundum Hundret, sed secundum canones et episcopales leges, et rectum deo et episcopo suo faciat. Si vero aliquis, per superbiam elatus, ad justitiam episcopalem venire contempserit, et noluerit; vocetur semel, et secundo, et tertio: Quod si nec sic ad emendationem venerit, excommunicetur; et, si opus fuerit ad hoc vindicandum, fortitudo et justitia regis vel vicecomitis adhibeatur: Ille autem qui vocatus ad justitiam episcopi venire noluerit, pro unaquaque vocatione legem episcopalem emendabit. Hoc etiam defendo, et mea auctoritate interdico, ne ullus vicecomes aut præpositus, seu minister regis, nec aliquis laicus homo, de legibus quæ ad episcopum pertinent, se intromittat; nec aliquis laicus homo alium hominem sine justitia episcopi ad judicium adducat: Judicium vero in nullo loco portetur, nisi in episcopali sede, aut in illo loco, quem episcopus ad hoc constituerit. *Spelm.* v. 2. p. 14.

No. XLI.—P. 241.

Form of a Citation in the Spiritual Courts.

Beilby, by divine permission, Bishop of *London*, to all and sin-
(L. S.) gular clerks and literate persons whomsoever and wheresoever, in and throughout our whole diocess of *London*, greeting, We do hereby authorize, empower, and strictly enjoin you, jointly and severally, peremptorily to cite, or cause to be cited, A. B. of the parish of in the county of and diocess of *London*, to appear lawfully before the right honourable Sir *William Scott*, knight, and doctor of laws, our vicar-general and official, principal of our consistorial and episcopal court of *London*, lawfully constituted his surrogate, or some other competent judge, in this behalf in the common hall of Doctors Commons, situate in the parish of Saints *Benedicts*, near *Paul's* wharf, *London*, and place of judicature there, on the third day after he shall have been served herewith, if it be a court day, otherwise on the court day then next following, at the usual and accustomed hours of hearing causes and doing justice there, then and there to answer to the Reverend C. D. clerk, rector of the said parish of in a certain cause of subtraction of tithes, Easter-offerings, and other ecclesiastical rights and emoluments, and further to do and receive as unto law and justice shall appertain, under pain of the law and the contempt thereof, at the promotion of the said C. D. and what you shall do or cause to be done in the premises, you shall duly certify our vicar-general and official

principal aforesaid, his surrogate, or some other competent judge in this behalf, together with these presents. Dated at *London*, the day of in the year of our Lord 1806, and in the 19th year of our translation.

No. LXII.—P. 241.

23 Hen. VIII. cap. 9. A. D. 1531.

An Act that no Person shall be cited out of the Diocess where he or she dwelleth, except in certain Cases.

I. 'Where great number of the king's subjects, as well men, wives, servants, as other the king's subjects, dwelling in divers dioceses of this realm of *England*, and of *Wales*, heretofore have been at many times called by citations, and other processes compulsary, to appear in the arches audience, and other high courts of the archbishops of this realm, far from, and out of the diocess where such men, wives, servants, and other the king's subjects been inhabitant and dwelling, and many times to answer to surmised and feigned causes, and suits of defamation, withholding of tithes, and such other like causes and matters, which have been sued more for malice, and for vexation, than for any just cause of suit.

II. 'And where certificate hath been made by the summoner, apparator, or any such light literate person, that the party against whom any such citation hath been awarded, hath been cited or summoned, and thereupon the same party, so certified to be cited or summoned, hath not appeared according to the certificate, the same party therefore hath been excommunicated, or at the least suspended from all divine service; and thereupon, before that he or she could be absolved, hath been compelled, not only to pay the fees of the court whereunto he or she was so called by citation, or other process, amounting to the sum of ii *s.* or xx *d.* at the least; but also to pay to the summoner, apparator, or other light literate person, by whom he or she was so certified to be summoned, for every mile being distant from the place where he or she then dwelled, unto the same court whereunto he or she was so cited or summoned to appear, ii *d.* to the great charge and impoverishment of the king's subjects, and to the great occasion of misbehaviour and misliving of wives, women, and servants, and to the great impairment and diminution of their good names and honesties:' Be it therefore enacted by the king our sovereign lord, with the assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by authority of the same, that no manner of person shall be from henceforth cited or summoned, or otherwise called to appear by himself, or herself, or by any procurator, before any ordinary, archdeacon, commissary, official, or any other judge spiritual, out of the diocess, or peculiar jurisdiction where the person which shall be cited, summoned, or otherwise (as is aforesaid) called, shall be inhabiting and dwelling, at the time of awarding, or going forth of the same citation or summons; except that it shall be for, in, or upon any of the cases or causes hereafter written; that is to say, for any spiritual offence, or cause committed or done, or omitted, forslewed, or neglected to be done, contrary to right or duty, by the bishop, archdeacon, commissary, official, or other persons having spiritual jurisdiction, or being a spiritual judge, or by any other person or persons within the diocess, or other jurisdiction, whereunto he or she shall be cited, or otherwise lawfully called to appear and answer.

III. And except also it shall be by or upon matter or cause of appeal, or for other lawful cause, wherein any party shall find himself or herself

grieved or wronged by the ordinary judge or judges of the diocess or jurisdiction, or by any of his substitutes, officers, or ministers, after the matter or cause there first commenced, and begun to be shewed unto the archbishop, or bishop, or any other having peculiar jurisdiction, within whose province the diocess or place peculiar is; or in case that the bishop, or other immediate judge or ordinary dare not, nor will not convent the party to be sued before him; or in case that the bishop of the diocess, or the judge of the place, within whose jurisdiction, or before whom the suit by this act should be commenced or prosecuted, be party directly or indirectly to the matter or cause of the same suit; or in case that any bishop, or any inferior judge, having under him jurisdiction in his own right and title, or by commission, make request, or instance to the archbishop, bishop, or other superior ordinary or judge, to take, treat, examine, or determine the matter before him, or his substitutes, and that to be done in cases only where the law civil or canon doth affirm execution of such request, or instance of jurisdiction; to be lawful or tolerable: upon pain of forfeiture to every person by any ordinary, commissary, official, or substitute, by virtue of his office, or at the suit of any person to be cited, or otherwise summoned, or called contrary to this act, of double damages and costs for the vexation in that behalf sustained, to be recovered against any such ordinary, commissary, archdeacon, official, or other judge, as shall award or make process, or otherwise attempt or procure to do any thing contrary to this act, by action of debt, or action upon the case, according to the course of the common law of this realm in any of the king's high courts, or in any other competent temporal court of record, by original writ of debt, bill, or plaint; in which action, no protection, other than such as shall be made under the king's great seal, and signed with his sign manual, shall be allowed, neither any wager of law, nor essoin shall be admitted; and upon pain of forfeiture for every person so summoned, cited, or otherwise called, (as is abovesaid) to answer before any spiritual judge out of the diocess, or other jurisdiction where the said person so dwelleth, or is resident or abiding, x *li.* sterling; the one half thereof to be to the king our sovereign lord, and the other half to any person that will sue for same in any of the king's said courts, or in any other the said temporal courts, by writ, information, bill, or plaint; in which action no protection shall be allowed, nor wager of law or essoin shall be admitted.

IV. Provided always, that it shall be lawful to every archbishop of this realm to call, cite, and summon any person or persons inhabiting or dwelling in any bishop's diocess within his province, for causes of heresy, if the bishop or other ordinary immediate thereunto consent, or if that the same bishop, or other immediate ordinary or judge do not his duty in punishment of the same.

V. Provided also, that this act shall not extend in any wise to the prerogative of the most reverend Father in God the Archbishop of *Canterbury*, or any of his successors, of or for calling any person or persons out of the diocess where he or they be inhabiting, dwelling, or resident, for probate of any testament or testaments; any thing in this act contained to the contrary notwithstanding.

VI. And be it further enacted by authority aforesaid, that no archbishop, nor bishop, ordinary, official, commissary, or any other substitute or minister of any of the said archbishops, bishops, archdeacons, or other having any spiritual jurisdiction, at any time from the feast of Easter next coming, shall ask, demand, take, or receive of any of the king's subjects, any sum or sums of money for the seal of any citation, after the said feast to be

awarded or obtained, than only iii *d.* sterling, upon the pains and penalties before limited, contained, and expressed in this present act, to be in like form recovered, as aforesaid.

VII. Provided always, that this act be not in any wise hurtful or prejudicial to the Archbishop of *York*, nor to his successors, of, for, or concerning probate of testaments within his province or jurisdiction, by reason of any prerogative; any thing in this act to the contrary thereof notwithstanding.

No. XLIII.—P. 244.

A Libel in a Cause of Tithes.

In the name of God, *Amen:* Before you the worshipful H. H. doctor of laws, vicar-general of the right reverend Father in God, E. by divine permission lord bishop of and official principal of his court of lawfully appointed your surrogate, or some other competent judge, the proctor of the reverend T. W. clerk, master of arts, vicar of the vicarage and parish church of in the county of and diocess of against J. B. of the parish, county, and diocess aforesaid, and against any other person or persons whomsoever, lawfully intervening or appearing for him in judgment by way of complaint, and thereby complaining unto you in this behalf, doth say, alledge, and in law propound articulately as follows, that is to say,

1. That the aforesaid T. W. clerk, in or about the month of last past, was duly and lawfully instituted and inducted in and to the vicarage of the parish church of in the county of aforesaid, with all the rights, members, and appurtenances to the same belonging and appertaining, and for and as vicar of the parish church aforesaid, he hath been, was, and now is commonly accounted, reputed, and taken to be; and the party proponent doth propound and alledge every thing in this article contained, jointly and severally, and doth also propound and alledge of any other time and place as shall appear from the proofs to be made in this cause.

2. That the right of receiving, taking and having the tithes, offerings, oblations, obventions, profits, and other ecclesiastical rights and emoluments within the bounds, limits, and titheable places of the vicarage and parish church of aforesaid, proceeding, encreasing, and happening, and especially the tithes and ecclesiastical rights mentioned in the schedule hereunto annexed, (which schedule the party proponent prays may be here read and inserted, and to which the said party proponent doth refer) by law have appertained and belonged to the vicar of the said parish, and parish church aforesaid for the time, and do belong and appertain to the aforesaid T. W. clerk, now vicar of the said vicarage, and so ought for the future to appertain and belong; and the party proponent doth alledge concerning any other tithes and ecclesiastical rights as shall appear from the proofs to be made in this cause, and as before.

3. That notwithstanding the premises aforesaid, the said J. B. in the year and month in the first article mentioned, or some or one of them, all and singular the tithes, offerings, obventions, and other ecclesiastical rights and emoluments mentioned and specified in the schedule annexed to these presents, (which schedule the party proponent prays may be here read and inserted,) forthcoming, growing and happening, all or some of them within the parish of aforesaid, and the titheable places of the said parish, either by himself or some persons belonging to him, hath received, held and possessed, and hath had and applied the same to his own use, without

pensation or composition with the said T. W. for the same; and the
y proponent doth alledge concerning any other ecclesiastical tithes,
ıts, and emoluments, as shall appear from the proofs to be made in this
ıse, and as before.

4. That the true value of the tithes and other ecclesiastical rights or emolu-
ments by the aforesaid J. B. as before set forth, taken, held and enjoy-
ed, hath been and is (as in the said schedule annexed is specified and men-
tioned) in the common estimation of men worth at least the sum of
s in the said schedule is set forth: and the party proponent doth allege as
before.

5. That the aforesaid J. B. hath been often, or at least once, thereof
requested to pay, give and deliver to the aforesaid T. W. or his lawful
his use, the said tithes, and other ecclesiastical rights and emoluments
tioned in the aforesaid schedule, or the value thereof, or to compound with
the said T. W. for the same; notwithstanding the premises at present,
refuses and defers so to do, and he doth alledge as before.

6. That the aforesaid J. B. was and is of the parish of in the county
of and diocese of and by reason thereof subject to the juris-
diction of this court, and the party proponent doth alledge and propound as
before.

7. That of and concerning the premises it hath been and is on the part
and behalf of the said T. W. rightly and duly complained to you the vicar-
general and official principal aforesaid, and to this court; and the party
proponent doth alledge as before.

8. That all and singular the premises aforesaid were and are true, publick
and notorious, and thereof there was and is a publick voice, fame and re-
port, and of which legal proofs being made, the party proponent prays
right and justice to be effectually administered to him and his party in the
premises, and the said J. B. not only to be condemned in the aforesaid
costs, so as before set forth unduly carried away and not paid, but likewise
in lawful costs on behalf of the said T. W. the vicar aforesaid, by reason of
this suit necessarily made or to be made, humbly praying a sentence or final
decree to compel the said J. B. to pay both the said tithes and expences,
and right and justice to be done to him and his party, by your definitive sen-
tence or final decree to be given in this cause; and further, &c. as in other
cases.

The Schedule mentioned in the aforesaid Libel.

In the [illegible] and months mentioned in the first ar-
ticle of the [illegible] the said J. B. had held, possessed and enjoyed
[illegible] acres of pasture ground within the said parish
and [illegible] pieces thereof, upon which he did
[illegible] and there did feed and depasture, within the time aforesaid,
[illegible] cows, which he caused to be
[illegible] milked, and the milk of them, and the
[illegible] the tithe
[illegible] ought to be rendered unto him the said J. B. for the same, is and
[illegible] the sum of and the party proponent doth
[illegible] and alledge, that the said tithes, either greater or lesser,
[illegible] and ought to be rendered unto him the said J. B. for the same, is and
[illegible] the sum of money libellate, or such other sum, quantity, or
[illegible] as upon the examination of the adverse party, or other lawful
[illegible] shall appear; and the party proponent doth

No. XLIV.—P. 246.

2 Henry V. c. 3. A. D. 1414.

A Copy of the Libel in the Spiritual Court shall be delivered.

Item, Forasmuch as divers of the king's liege people be daily cited to appear in the spiritual court before spiritual judges, there to answer to divers persons, as well of things, which touch freehold, debt, trespasses, covenants, and other things whereof the cognizance pertaineth to the court of our lord the king, as of matrimony and testament; and when such persons so cited appear and demand a libel of that which against them is surmised, to be informed to give their answer thereunto, or otherwise to purchase a writ of our lord the king of prohibition, according to their case, which libel to them is denied by the said spiritual judges, to the intent that such persons should not be aided by any such writ, against the law, and to the great damage of such persons so impleaded: our said lord the king, by the advice and assent of the lords spiritual and temporal, and at the request and instance of the said commons, hath ordained and established, that at what time the libel is grantable by the law, that it may be granted and delivered to the party without any difficulty.

No. XLV.—P. 246.

Form of Writ to compel delivery of a Copy of Libel.

The king to the dean of the arches of *London* and his commissary greeting.—Whereas by a statute passed in the parliament of our father the late Lord King Henry of *England*, holden at Leicester, in the second year of his reign, it was enacted amongst other things, whenever a copy of the libel is by law to be granted, that it be granted and delivered to the party without difficulty; and whereas we find from the complaint of Radulphus, that he has frequently requested you to grant and furnish him with a copy of the libel in the cause moved, and pending against him in the spiritual court at the suit of I. and which copy ought according to law to be granted as it is said: and that you have and still do defer for the present so to do, and to deliver the same to the said Radulphus, in contempt of us and to the great loss of the said Radulphus, and contrary to the form, force, and effect of the aforesaid statute. It being our will that that statute should be observed inviolably in every particular, we command you as it is allowed of, to deliver to the said Radulphus a copy of the libel in the aforesaid cause moved against him, and pending before you, if by law it ought to be so granted, and to deliver it to him without difficulty, according to the form of the aforesaid statute. And that this you by no means omit to do, under the penalty of 100*l.* T. &c. 38 H. VI.

No. XLVI.—P. 247.

The various proceedings in the Spiritual Court relating to the taking of Evidence.

Witness produced.

H. against H. *C. S.* On which day S. upon the allegation by him given in and admitted in this cause, on the behalf of his client, produced as a witness E. S. whom the judge at his petition admitted and received, and administred to him the oath usually taken by a witness, and admonished him to undergo his examination when notice should be given to him in the presence of C. dissenting, and having the usual time allowed him for interrogatories or any other time before his examination.

Commission to examine Witnesses decreed.

H. against H. *C. S.* On which day S. alleged that his client had several very necessary witnesses to prove the contents of his allegation, but that they live in parts remote from hence, so that they cannot conveniently attend to undergo their examinations here without great trouble and expence; wherefore he prayed, and the judge at his petition decreed a commission to be made out to parts remote, directed to the Rev. A. B. and C. D. clerks, commissioners named by and on the behalf of his client, and also to C. D. and E. F. clerks, also commissioners named by C. jointly and severally to sit in the parish church of N. on the days of next ensuing, with power of continuation and prorogation of time and place, as occasion shall require, for the receiving, admitting, swearing, and examining, and of taking the depositions in writing of all such witnesses as shall be produced on the allegation heretofore given in and admitted in this cause on the part and behalf of his client, and of taking the repetition and recognition of the subscriptions of the said witnesses to their several examinations, they assuming to themselves a notary public indifferent to the parties to be their register; and the said judge assigned the said S. to return the said commission, together with all proceedings had and done thereon, on or before the, &c. in the presence of C. dissenting and protesting, yet having the usual time, as well to annex interrogatories to the said commission, as to administer them at the time of the execution thereof.

Commission returned, and Publication decreed.

H. against H. *C. S.* S. is to return a commission with examinations.

On which day S. returned a commission taken out by him in this cause, together with the examinations of the witnesses taken by virtue thereof, and prayed; and the judge at his petition decreed the sayings and depositions of the witnesses examined by virtue of the said commission to be published, and copies thereof to be delivered to each party, in the presence of C. dissenting.

Requisition for Examinations.

H. against H. *C. S.* On which day the judge at the petition of S. (alleging that his client had several necessary witnesses to prove the contents of his allegation, but that they live in the diocese of N.) decreed a commission or requisition by way of mutual favour, to be directed to the right Rev. &c. his vicar general or official principal, his surrogate, &c. to sit in the consistorial place of the cathedral church of D. on the days of next ensuing, with full power of proroguing and continuing the said time and place as need shall require, for the producing, receiving, admitting, swearing, examining, and repeating all such witnesses as shall be produced on the allegation by him given and admitted on the behalf of his client in this cause, assuming to themselves a notary public indifferent to the parties in this suit, for the execution of the said requisition and examination of the said witnesses so to be produced, sworn, and examined by virtue thereof, and assigned the said S. to return the said commission or requisition into the registery of this court, together with all proceedings had and done thereon, on or before the, &c. in the presence of C. dissenting and protesting, yet having the usual time, as well to annex interrogatories to the said commission or requisition, as to administer them at the time of the execution thereof.

Requisition returned, &c.

H. against H. *C. S.* S. is to return his requisitions for examinations.

On which day S. brought in the requisition by him formerly taken out in

this cause, together with the examination of two witnesses, in the presence of C. praying; at whose petition the judge assigned the proctors on both sides to propound all things which are necessary for them respectively to propound on the next court day, the said C. dissenting.

Compulsory decreed.

H. against H. *C. S.* On which day S. alleged that A. B. and C. D. were, and are very necessary witnesses to prove the contents of the allegation by him given and admitted in this cause, who having been offered their necessary travelling charges and expences, have and do still refuse to come and attend to give their testimony in this cause, unless by law they are compelled thereto; wherefore he prayed, and the judge at his petition decreed the said A. B. and C. D. to be cited and compelled to appear personally before him, his surrogate, or, &c. in the, &c. on the, &c. then and there to take the oath usually taken by witnesses, and to testify the truth of what they know in this cause, under pain, &c.

Ditto Viis et Modis.

H. against H. *C. S.* On which day the judge, at the petition of S.* alleging that A. B. and C. D. were diligently sought for and inquired after at their respective places of abode, by the mandatory in this behalf lawfully authorized, with an intent to have cited them personally (if they could have been found) to give their testimony in this cause, but could not there be met with, decreed them to be again cited personally (if they can be so found,) otherwise by publicly affixing a decree for some time upon the outward doors of the several houses, or last usual places of abode of the said A. B. and C. D. or on the outward doors of the parish churches of the parishes wherein they now do, or lately did dwell, on the Sunday or festival day next and immediately following the receipt of the said decree, during the time of divine service, and by leaving there affixed a true copy thereof, and by all other lawful ways, means, and methods whatsoever, whereby the said decree may most likely come to the knowledge of them the said A. B. and C. D. to appear before him, his surrogate, &c. [as in the compulsory act.]

Excommunication decreed.

H. against H. *C. S.* On which day a public proclamation being thrice made for A. B. the party cited, and he by no means appearing, but contumaciously absenting himself, the judge at the petition of S. (accusing his contumacy) pronounced him in contempt, and for such his manifest contumacy and contempt decreed him to be openly and publicly denounced, and declared to be excommunicate in the face of the church; but ordered the excommunication not to be extracted within a week from this day.

Excommunication brought in; &c.

H. against H. *C. S.* On which day S. exhibited letters of excommunication duly denounced, together with a certificate of the due p[ublic]ation thereof on the back of the same, and alleged that A. B. therein named was and is by the authority of this court excommunicated, and as such at proper time and place duly denounced, and that he had stood under the sentence of excommunication for the space of forty days and upwards after the denouncing thereof, and still perseveres in the same out of an obstinate disposition, and contemning the ecclesiastical jurisdiction; wherefore he

* In like manner are citations *tiis*, &c. and monitions and decrees to be set forth.

prayed, and the judge at his petition decreed it should be wrote to the king's majesty for his writ for the taking of his body.

Absolution decreed.

H. against H. *C. S.* On which day appeared personally A. H. the party principal in this cause, and, without revoking his proctor constituted in this behalf, alleged that for his contempt in not giving in his personal answers to a certain pretended libel admitted in this cause, he had been excommunicated, and that such excommunication had been denounced against him, and that having remained under the said sentence of excommunication for the space of forty days, it had been signified to his majesty for a writ for the taking his body, and that such writ had issued and a warrant thereupon, and that thereon he is now in custody, but that he is now willing to submit to the said assignation, and to give in his answers to the said libel, [whereupon C. produced him for his answers, and the judge gave him the oath, and the said A. H. exhibited his answers in writing, and acknowledged his subscription thereto,] and alleged that he had paid the contumacy fees incurred by his aforesaid contempt, and therefore he prayed to be absolved; whereupon the judge gave him the oath, that he would be obedient to his majesty's ecclesiastical laws, and the lawful commands of his ordinary for the future, and that he would not willingly incur sentence of excommunication again, and then decreed him the said A. H. to be absolved and freed from the sentence of excommunication denounced against him, and an absolution to pass the seal accordingly, in the presence of the said C. not opposing the same.

The Form of Interrogatories in a Suit of Equity on behalf of the Complainant.

Interrogatories to be administered to witnesses to be sworn and examined by virtue of a commission, issued out of and under the seal of the high court of chancery in a certain cause there depending, and now at issue, wherein A. B. C. D. E. F. are complainants against G. H. clerk, defendant on the part and behalf of the complainants.

1. Do you know the parties in this cause named, plaintiffs or defendants, either and which of them? And how long have you known them, either and which of them.—Declare.

2. Do you know the parish of Almondsbury in the county of Gloucester, in the pleadings in this cause named? If yea, how long have you known the same, and is or is not the said parish as you know or believe divided into or consist of any, and how many, districts or separate tithings or divisions? If yea, how are they respectively called or distinguished.—Declare.

3. Do or do not the said several tithings, as you know or believe, or any and which of them comprehend and contain any smaller, central, or distinct districts or divisions? If yea, set forth how such smaller districts or divisions are called or known by name, and in which of the said several tithings or divisions they respectively be or belong to.—Declare.

4. Are you or are you not acquainted with the manner of tithing in the said parish of ? If yea, how long have you known or been acquainted therewith, and what is the usual and customary manner of tithing in the said parish and titheable places thereof? Are or are not, or have or have not tithes in kind been customarily paid for the several lands in the said parish, or has or have any, and what modus or moduses or ancient customary payment been paid for or in lieu or satisfaction of tithes, or any and what tithes in the said parish as you know or believe.—Declare.

5. Do you or do you not know any place or places, district, division or

tithing in the said parish, called or known by the names of or or either of them, or by the names of ? If yea, are or have any and what tithes in kind been usually paid for the several lands in the several places, districts, divisions or tithings before-mentioned as you know or believe.—Declare.

6. Do you or do you not know whether any modus or modus's or ancient customary payment have been usually paid by the occupiers of lands in the said several districts, tithings, divisions or places in the preceding interrogatories mentioned, or any and which of them, for or in lieu or satisfaction of any and what tithes arising, renewing, or increasing on the lands within the said district or division, or any and which of them? If yea, what is, or are such modus or modus's or ancient customary payment, and for what tithes respectively payable, and to whom, and when, and how long have you known the same to be paid, and by whom, and to whom, and what has been the common reputation concerning the manner of tithing within the said parish or division in the preceding interrogatories mentioned? Hath it been that tithes were due and payable in kind, or that any and what modus or modus's or ancient customary payments were due and payable in lieu thereof, or any and what species thereof.—Declare all you know or believe, touching the matters in these interrogatories inquired upon, with the reason for your belief at large.

7. Do you or do you not know any district, division, or tithing in the said parish of called or known by the name or names of or by the names of or any and which of them? If yea, are or have any and what tithes in kind been usually paid for the several lands in the said district, division, or tithes, or any and which of them as you know or believe.—Declare.

8. Do you or do you not know, or can you or can you not set forth whether any modus or modus's or ancient customary payments have been usually paid by the occupiers of lands within the said several districts, divisions, or tithings in the preceding interrogatories mentioned, or any and which of them, for or in lieu or satisfaction of any and what tithes arising, renewing, or increasing on the lands within the said district or division, or ancient customary payment, and what species of tithes respectively payable, and to whom and when, and how long have you known the same to have been paid, and by whom, and to whom, and what has been the common reputation concerning the manner of tithing within the several districts, divisions, or tithings in the preceding interrogatories mentioned? hath it been that tithes were due and payable in kind, or that any and what modus or modus's or ancient customary payments were due and payable in lieu thereof, or of any and what species thereof.—Declare.

9. Look upon the several books and papers now produced, and shewn to you at this the time of your examination marked respectively ( ) of whose hand writing are the same or any and which of them, or any and what part of them, or either of them as you for any and what reason know or believe. To whom did the same or any and which of them belong, and how and where have the same been kept from the time that the same were respectively written, as you know or believe.—Declare.

10. Look upon the paper or papers now produced to you, at the time of this examination marked (A.) did you examine the same, or any or either and which of them with the record itself, of which the same purports to be a copy or copies, and when and with whom did you examine

the same? And is the same a true copy or copies of such record or records as you know or believe.—Declare.

11. What in your judgment or opinion is the value of the several tithes or modus payable in lieu thereof, due and payable to the vicar of one year with another, according to the usual and customary manner of tithing in the said parish of ? And what in your judgment is, or would be the value of the several tithes if paid in kind one year with another, as you know or believe.—Declare.

12. Has or has not, as you know or believe, the quantity of land used as meadow or pasture in the said parish, been one year with another near the same during your knowledge thereof? And has or has not more land been laid down to meadow and pasture in the said parish, for some and how many years past, than when you first knew the same.—Declare.

13. Was or has not the number of cows kept and depastured within the said parish, been increased since first you knew the same? If yea, for how many years last past has the number been so increased.—Declare.

14. Have or have not any and which of the vicars of , as you know or believe, at any time and when, made or accepted any composition with the owners or occupiers of the land in the said parish, or any of them, for or in regard to tithes? If yea, what was such composition, and was such composition as you know or believe calculated on the foot of tithes in kind being due, or on the ground of any and what customary payments being due, in lieu and satisfaction thereof.—Declare.

15. Is there or is there not any glebe land belonging to the vicar of in right of the said vicarage? If yea, where does the same lie, and of how much in measure doth the same consist as you know or believe.—Declare.

16. Do you know, or can you depose any other matter or thing concerning the matters in question in this cause, which may tend to the benefit or advantage of the complainants in this cause? If yea, set forth the same with the reasons for your belief at large, as if you had been particularly interrogated thereto.

The Form of Interrogatories in a Suit of Equity in behalf of the Defendant.

Interrogatories to be administered to witnesses to be produced, sworn, and examined by virtue of a commission issued out of and under the seal of the high court of chancery in a certain cause there depending, and now at issue, wherein A. B. C. D. E. F. &c. are complainants, and G. H. clerk is the defendant, on the behalf of the said defendant.

1. Do you know the parties in this cause named, plaintiffs or defendants, or any and which of them, and how long have you known them either and which of them.—Declare.

2. Do you know or are you acquainted with the parish of in the county of in the pleading in this cause mentioned? If yea, how long have you been acquainted therewith, is or is not the vicar of aforesaid, for the time being, entitled to receive some and what tithes in the parish of and the several titheable places thereof, and are and are not the same payable in kind, as you know or believe.—Declare the reasons for your belief at large.

3. Do you or do you not know, or have you or have you not heard whether the owners or occupiers of lands in the said parish of and the several titheable places thereof, or some and which of them, have usually or at any time, and when, paid tithes of hay, milk, foals, gardens, and orchards, calves, lambs, and pigs, or any and which of them to the

vicar of , for the time being, in kind, or have they paid any composition for the same or in satisfaction thereof, or any and which of them thereof? If yea, what was such composition or satisfaction, and for which of the said species of tithes respectively, how was such composition or satisfaction always the same sum, and in the same proportion for each of the said several species of tithes, either and which of them, and paid always at the same time, or was or was not such composition or satisfaction for some and which of the said species of tithes sometimes varied, and different at different times, by the same or different vicars for the time being, and paid at different times, and do you or do you not know, or have you or have you not heard that different sums and different proportions have been paid at different times by the owners and occupiers of land, or some of them, to the vicar of for some and which of the said species of tithes before-mentioned.—Set forth what you know or believe, or have heard concerning the matters in this interrogatory enquired after at large.

4. Have or have not, as you know or believe, or have heard, some of the land owners or occupiers of land in the parish of or the titheable places thereof, made some agreement or composition with the vicar of aforesaid, for the time being, for their tithe due to him at some certain sum, and how much in the pound, according to the annual rent of the lands for which such tithes were due? If yea, at how much in the pound were such agreement or compositions, each and every of them; were they always at the same rate, or at different rates at different times, and who by name was or were vicar or vicars of at the time of such composition entered into respectively as you know or believe, set forth, or have heard, touching the matters in these interrogatories inquired after at large?

5. Do you know, or can you depose any other matter or thing concerning the matters in question in this cause, which may tend to the benefit or advantage of the defendant in this cause? If yea, set forth the same as if you had been particularly interrogated thereto.

No. XLVII.—P. 248.

The several Acts of the Spiritual Courts in passing Sentence, and protesting against, and appealing from, Sentences of Inferior to Superior Courts.

Sentence porrected by one, &c.

H. against H. *C. S.* For information and sentence at the petition of S.

On which day S. porrected a definitive sentence in writing, which he prayed to be read, promulged and given, and right and justice to be done and administred to him and his party in the premises, in the presence of C. dissenting, and praying right and justice to be administred to his client; whereupon the judge having heard the advocates and proctors on both sides, read, promulged and gave the sentence by S. porrected, thereby pronouncing, decreeing, declaring and doing in all things as in the same is contained; then S. porrected a bill of expences made or to be made on the behalf of his client in this cause, which he prayed to be taxed; and the judge at his petition taxed the same at the sum of of lawful money of *Great Britain*, besides the sum of 14*s.* 10*d.* for the expences of a monition for the payment thereof, extending in the whole to the sum of . Then S. made oath that his client hath, and must necessarily expend the sum taxed, and prayed; and the judge at his further petition decreed C.'s client to be monished to pay or cause to be paid to S.'s client, or her proctor, the said sum taxed, besides the expence of the monition, extending as afore-

said, within ten days after the said monition shall have been duly executed, but ordered that the said monition should not go under seal within ten days from this time; there being then and there present with me the register aforesaid, the worshipful G. P. and J. A. respectively, doctors of law, advocates of this court, and also E. G. and B. H. notaries public, proctors of the said court, as witnesses.

Party dismissed from further Proceedings, &c.

H. against H. *C. S.* On which day the judge (having heard advocates and proctors on both sides) did, by his final interlocutory decree, having the force of a definitive sentence, in writing, dismiss S.'s client from all further judicial observation in this behalf, and condemned C.'s client in costs; and the said S. porrected a bill of expences, which he prayed to be taxed, but the judge reserved the taxation thereof to the next court-day.

Sentences porrected on both Sides, &c.

H. against H. *C. S.* For sentence at S.'s petition.

On which day the proctors on both sides porrected sentences in writing, which they respectively prayed to be read, promulged and given, and right and justice to be effectually done and administred to them and their parties respectively in the premises; whereupon the judge having heard the advocates and proctors on both sides, and having maturely considered this business, read, promulged and gave the sentence porrected by S. thereby pronouncing, declaring, decreeing and doing in all things as in the said sentence is contained, the said C. praying sentence as before, protesting of a grievance done to his client, and of appealing in due time and place, there being then and there present, &c. as witnesses; upon all which premises the said S. requested me the said register to make him one or more publick instrument or instruments, and to subscribe and deliver the same to him.

ACTS IN A CAUSE OF APPEAL.

Act on decreeing the Inhibition, Citation, and Monition, &c.

A business of appeal and complaint of nullity promoted and brought by G. A. of C. in the diocese of B. and province of C. the party appellant and complainant on the one part, and M. S. of the parish, diocese, and province aforesaid, the party appellate and complained of on the other part.

C.

On which day C. exhibited as proctor for the said G. A. and made himself party for him, and alledged that the worshipful T. R. LL. D. vicar-general and official principal of the right reverend Father in God T. by divine permission, lord bishop of B. or his pretended surrogate, unduly and unjustly proceeding in a certain pretended cause of which lately depended in judgment before him or his pretended surrogate, between M. S. the pretended party, agent and complainant on the one part, and his client the said G. A. the party accused and complained of on the other part, did as well by virtue of his own pretended office, as at the unjust solicitation, instigation, procurement and petition of the said M. S. by his interlocutory decree, having the force of a definitive sentence in writing, decree to the very great detriment and prejudice of the said G. A. and that it had been instantly on the part and behalf of the said G. A. in due form of law from all and singular the grievances aforesaid, and from all and singular other the grievances, nullities, iniquities, injustices, injuries, and errors in the proceedings of the said pretended judge or his pretended surrogate, rightly and duly appealed to the arches court of C. and to the official principal thereof; wherefore the said C. prayed, and the surrogate aforesaid at his

petition decreed the said worshipful T. R. LL. D. the judge aforesaid, his surrogate or surrogate's register and actuary, the said M. S. in special, and all others in general (who by law in this behalf ought to be inhibited), to be inhibited, that neither they, any or either of them, pending this cause of appeal and complaint, do attempt or cause to be attempted or done any thing to the prejudice of the said G. A. whereby he may be impeded in the prosecution of such appeal; and also decreed the said M. S. to be cited to appear before the official principal aforesaid, his surrogate, or some other competent judge in this behalf, in the common hall of Doctors Commons, *London*, and place of judicature there, on the sixth day after his being served with a citation to that effect, if it be a court-day, otherwise on the court-day from thence next following, at the usual hours for hearing causes and doing of justice there, then and there to answer to the said G. A. in his said cause of appeal and complaint; and further to do and receive as to law and justice shall appertain; and at the further petition of the said C. decree the said worshipful T. R. LL. D. his surrogate or surrogate's register or actuary in special, and all others in general with whom any of the proceedings touching or concerning the said cause, may or do remain to be monished, to transmit the same in a due and authentic form into the registry of the said arches court on or before the day of next ensuing, under pain of the law and contempt thereof.

Inhibition and Monition returned.

A. against S. *C. S.* On which day C. returned the original inhibition and monition by him taken under seal in this behalf, with proper certificates of their having been duly executed; then public proclamation being thrice made for the parties cited and admonished, and they nor either of them appearing, &c. [as in the act in the first instance] S. appeared, exhibited his proxy, and made himself a party for them and prayed a libel, &c. [as in the first instance.]

Appeal exhibited.

A. against S. *C. S.* On which day C. exhibited an appeal in writing, and alledged the same to have been rightly and duly made and interposed in due time and place, and to have been subscribed by an honest and lawful notary public, and by witnesses of good faith and credit; and that G. A. and M. S. mentioned in the said appeal, and G. A. and M. S. parties in this cause were and are the same persons, and not divers, and prayed an answer to be given immediately thereto by S. to which he dissented, but confessed the said subscription and identity to be true.

Monition for Things omitted in Transmission.

A. against S. *C. S.* On which day C. alledged that a had issued under the seal of the judge from whom this cause is appealed, and that notwithstanding the premises the said was totally omitted in the proceedings of the said judge, transmitted to the registry of this court; wherefore he prayed, and the judge at his petition decreed the judge from whom this cause is appealed, his surrogate, register or actuary in special, and all others in general, in whose power, custody, or possession, the said original may or doth remain, to be monished to transmit the same, or cause it to be transmitted to him, his surrogate, or, &c. in the, &c. on or before, &c. under pain, &c.

Monition for an original Will.

A. against S. *C. S.* On which day S. alledged that the original last will and testament of A. B. the testator in this cause, deceased, exhibited, and

pleaded on his client's behalf in the first instance of this cause, doth now remain in the registry of the consistory court of H. wherefore he prayed, and the judge at his petition decreed the worshipful E. W. LL. D. vicar-general, &c. the pretended judge from whom this cause is appealed, and his surrogate, register or actuary in special, and all others, &c. in whose power, custody or possession the said original will is or doth remain, to be cited and monished, that they or one of them do on or before the, &c. next ensuing, transmit or, &c. [as before.]

Monition for Expences of transmitting Process Subpœna, &c.

A. against S. *C. S.* On which day H. exhibited as proctor for B. R. notary public, principal register of the arches court of C. from whence this cause is appealed, and made himself a party for him, and alledged that the expences of transmitting the process brought in, in the said cause, and remaining in the registry of this court, amount to and are taxed at the sum of and that the sum of was paid by P. P. the officer of the said court to the said B. R. in part or on account of the expences of the said transmission, and that the sum of remains due to the said B. R. for the expences of transmitting the said process, and that the said G. A. refuses to pay, or at least has deferred paying to the said B. R. the said sum of wherefore the said H. prayed, and the Judge at his petition decreed the said G. A. to be monished to pay or cause to be paid effectually to the said B. R. the said sum of and also the sum of for the expences of a monition to be extracted in this behalf, and for the execution thereof, amounting in the whole to the sum of of lawful money of Great Britain, within ten days after the said monition has been served upon him, under pain of the greater sentence of excommunication, and decreed the said G. A. (in case he does not pay the said sum before taxed in manner and form aforesaid) to be openly and publicly denounced excommunicate in the face of the church.

Admission into second Year.

A. against S. *C. S.* On which day C. alledged that it is a year since the appeal was interposed on the behalf of his client in this cause, and prayed, and the judge at his petition admitted him into a second year.

Appeal pronounced for.

A. against S. *C. S.* On which day the judge (having heard advocates and proctors on both sides) did by his final interlocutory decree pronounce for his jurisdiction, and for the validity of the appeal and complaint made and interposed in this behalf, and that the judge from whom this cause was appealed had proceeded nully and unjustly, and reserved the sentence by him read, &c.

Appeal renounced, and Cause remitted.

A. against S. *C. S.* On which day S. exhibited a special proxy under the hand and seal of M. S. his client, the party appellant in this cause, whereby she renounced her appeal; then R. prayed, and the judge at his petition did by his final interlocutory decree, having the force of a definitive sentence in writing, decree this cause to be remitted, with all its incidents, emergents, dependants, and things adjoined and connected thereto, to the judge, from whom the same in this behalf was appealed, and to his examination.

No. XLVIII.—P. 250.

Writ of Prohibition.

George the Third, by the grace of God, &c. to the worshipful *George Harris*, doctor of laws, commissary of the right reverend Father in God,

John, by divine permission, lord bishop of W. for that part of the diocese of W. which lies within the parts of, &c. lawfully constituted for causes ecclesiastical, or his surrogate, or other competent judge whatsoever in this behalf, greeting: Whereas it was shewn unto us on the behalf of W. R. of, &c. in our court before us at W. on Thursday next, after eight days of St. Hilary, in the seventeenth year of our reign, that the parish of, &c. was then, and from time whereof, &c. had been, &c. that by the statute of *magna charta*, &c. that all and all manner of pleas, &c. (reciting the whole of the suggestion as far as the granting the writ of prohibition, only instead of the words *our lord the now king* and *his* crown of *England*, say us and our crown of *England*, and making the like alteration where the like words occur;) we, therefore, willing to maintain the laws and rights of our crown of *England*, as by the obligation of our oaths we are bound, and unwilling that our liege subjects should be injured by suspensions in contradiction there, do prohibit you and each of you, firmly enjoining that you do not further proceed in the premises against the said W. R. nor any further hold plea before you in any way touching the premises, nor that you or any of you attempt any thing that may tend to the damage of the said W. R. or to our prejudice, or in derogation or contempt of the laws, statutes, and custom of our kingdom of *England*, or to the hurt of our crown, under the danger of incurring the penalty of violators of our law; and if you have pronounced judgment against him the said W. R. by reason of the premises release him therefrom, and absolutely absolve him from the same, on the peril incumbent; witness William, Earl of Mansfield, at W. the day of in the seventeenth year of our reign.

No. XLIX.—P. 251.

Writ of Consultation upon a Suggestion for a Modus *for Tithes.*

George III. &c. To the reverend and excellent man Thomas B. doctor of laws, of the reverend Father in Christ, John, by divine permission lord bishop of Chichester, in and through the whole archdeaconry of Lewis, in the diocess of Chichester, official principal, or other judge in that behalf competent: William G. vicar of the vicarage of the church of W. in the county of Sussex, hath shewn to us, that whereas he by the name of W. G. vicar of the vicarage of W. in the county of S. had lately in the court christian before you impleaded one John R. by the name of John R. of W. aforesaid, yeoman, for this, that the said W. G. in the months of September, October, &c. (*And so recite the suggestion.*) And the said J. R. hath lately prosecuted, and caused to be directed to you our certain prohibition out of our court, before our justices at Westminster, that you should not farther hold the plea aforesaid, in the court christian aforesaid, before you, or any thing further in that behalf attempt, by pretence of which our said prohibition you have from thence hitherto delayed, and yet do delay farther to proceed in the said cause of subtraction of the tithes aforesaid in this behalf alledged, as we have understood to the great damage of the said W. G. and to the manifest prejudice of the ecclesiastical liberty: wherefore the same W. hath in our court before our justices at Westminster humbly besought us to grant him our aid and assistance in this behalf, and we favourably consenting to the petition of him the said W. and being unwilling that the cognizance which to the ecclesiastical court in this behalf belongs should be farther delayed by such false and subtle assertions, because in our said court before our justices at Westminster it is in such manner proceeded, that it is considered by the same court that the said W. G. may have our writ of con-

sultation to the court christian aforesaid, our said writ of prohibition aforesaid to the contrary thereof notwithstanding, whereof the said J. R. is convicted, as it appears to us on record: We therefore being unwilling that the said W. G. should be in any wise injured in this behalf, signify to you and command, that you may in that cause lawfully proceed, and farther do what you shall know to belong to the ecclesiastical court, our said prohibition to the contrary thereof before to you directed in any wise notwithstanding. Witness, &c.

No. L.—P. 550.

Foster and another against *Hall.*

Hill. 7 Will. III. Roll. 128.

Stafford, to wit. Be it remembered, that on Friday next after 15 days of St. Martin, in Michaelmas term last past, before the lord the king at Westminster came William Foster the younger and William Hawkisford, who as well for the lord the king as for themselves prosecute by Nathaniel Hickman their attorney, and produced here in the court then there their certain bill against Thomas Hall, clerk, vicar of the vicarage of the parochial church of Bushbury in the county aforesaid, in the custody of the marshal, &c. in a plea, why he prosecuted a plea against them the said W. Foster and W. Hawkisford in the court christian after the royal prohibition to him first to the contrary thereof directed and delivered; and there are pledges to prosecute, to wit, John Doe and Richard Roe; which said bill follows in these words, to wit, Stafford, to wit, William Foster the younger, and William Hawkisford, who as well for the lord the king as for themselves prosecute, complain of Thomas Hall, clerk, vicar of the vicarage of the parochial church of Bushbury in the county aforesaid, being in the custody of the marshal of the marshalsea of the lord the king before the king himself in a plea, why he prosecuted a plea against them the said W. Foster and W. Hawkisford in the court christian, against the royal prohibition to them first to the contrary thereof directed and delivered, for this, to wit, that whereas all and singular pleas of and concerning prescriptions and customs within this kingdom of England, and the cognizance of the same pleas, to the said lord the king and his royal crown especially belong and appertain, and at the common law in the courts of the lord the king of record, and not in the ecclesiastical court, ought to be tried and discussed, and always hitherto have been accustomed: And whereas all and singular the occupiers, tenants and farmers of one messuage, one garden, 100 acres of land, 40 acres of meadow, and 200 acres of pasture with the appurtenances, commonly called Wobaston farm in the parish of Bushbury in the said county of Stafford for the time being, have from time immemorial been accustomed to pay to the vicar of the vicarage of the parochial church aforesaid for the time being, or his farmer of that vicarage, yearly, the annual sum of 15 s. of lawful money of England, in full contentation, payment and satisfaction of all and singular the tithes whatsoever of wool, lambs, pigs, geese, milk, calves, apples, pears and plumbs, of and from the said messuage and tenements with the appurtenances, called Wobaston farm, howsoever happening, and growing or arising, as also of all Easter-offerings for the occupiers of the messuage aforesaid, and for the same messuage and garden, and also of all other small tithes whatsoever to the vicar of the vicarage aforesaid for the time being of and from the tenements aforesaid yearly payable. And whereas also the said W. Foster, on the 26th day of March in the 11th year of the

reign of the lord the now king and of the lady Mary the late queen of England, was and yet is occupier and farmer of the said messuage, garden, 88 acres of land, 40 acres of meadow, and 200 acres of pasture with the appurtenances, parcel of the said messuage and tenements called Wobaston farm: And whereas also the said W. Hawkisford on the same 26th day of March, in the fifth year abovesaid, was and yet is occupier and farmer of 12 acres of land, the other parcel of the said messuage and tenements called Wobaston farm: Nevertheless the said Thomas Hall, clerk, vicar of the vicarage of the parochial church aforesaid, not ignorant of the premisses, but contriving and intending them the said William Foster and William Hawkisford, against the due form of the law of this kingdom of England, and against the prescription and manner of tithing aforesaid, unduly to aggrieve, and greatly to oppress and fatigue, and also the said now king and his royal crown to disinherit, and the cognizance of the plea, which to him the said now king and his royal crown particularly belongs and appertains, to another proof in the court christian to draw, them the said William Foster and William Hawkisford in the court christian, before the venerable and excellent man Sir Richard Raines, knight, doctor of laws, official principal of the consistory court of the bishop of Litchfield lawfully constituted, hath drawn in plea, craftily and subtilly libelling against him the said William Foster, that he the said William Foster in the months of March, &c. in the years of the Lord 1693 and 1694, or of them, &c. had, &c. 10 bushels or measures of apples, and 10 bushels or measures of pears, within the parish of Bushbury aforesaid, and the bounds, &c. growing, and 60 ewe sheep, and 70 barren sheep and wethers, one sow, and likewise two geese, in the same parish of Bushbury aforesaid, in the months and years aforesaid, or of them, &c. and had from the same ewe sheep, barren sheep and wethers, 130 pound of wool there yearly and every of the years aforesaid shorn, and of and from the said 60 ewe sheep 60 lambs, there yearly and in every of the said years bred, and of and from the said sow 10 pigs there yearly and in every of the years aforesaid pigged, and of and from the same geese 20 goslings there yearly and in every of the said years hatched, and that within the parish of Bushbury aforesaid, and the bounds, &c. there was a certain laudable and ancient prescribed custom, that every master of a family any mansion-house and garden within the same parish having, &c. and a family there keeping and maintaining, and divine service in the parochial church of Bushbury aforesaid hearing, and the sacraments and sacramentals there receiving, or so to hear and receive being bound, to the vicar of the vicarage of the parochial church of Bushbury aforesaid, or to his farmer for the time being, in the name of certain rights or ecclesiastical emoluments within the same parish, commonly called Easter-offerings or house-duties, hath yearly paid, or ought to pay, 3 *d.* of lawful money of England for himself, 1 *d.* for his house, commonly called a smoak-penny, 1 *d.* for his garden, commonly called a garden-penny, 1 *d.* for every milch-cow, 1 *d.* and ½ *d.* for every calf there brought forth, for and in lieu of the tithes of every such cow and calf yearly at the feast of Easter; and that the said William Foster in the months and years aforesaid was a master of a family within the parish of Bushbury aforesaid, and a family there yearly kept and maintained, and had a mansion-house, garden, and six milch cows within the same parish yearly brought up and with young; and that he the said William Foster for all the time aforesaid divine service in the parochial church of Bushbury aforesaid did hear, and the sacraments and sacramentals did receive, or so to hear, &c. that plea in the court christian after the royal prohibition to him to the contrary thereof directed and delivered, to wit, on the 22d day

of November, in the 7th year abovesaid; at Litchfield Close in the county aforesaid, hath farther prosecuted, the said writ of the said lord the king of prohibition to him to the contrary thereof directed and delivered in any wise notwithstanding, in contempt of the said lord the now king, and to the great damage of them the said William Foster and William Hawkisford, and against the prohibition aforesaid; whereby they the said William Foster and William Hawkisford, who as well, &c. say that they are prejudiced, and have damage to the value of 100 *l.* And therefore as well for the said lord the king as for themselves they produce the suit, &c.

And now on this day, to wit, Thursday next after the Octave of St. Hillary in this same term, until which day the said Thomas had leave to impart to the bill aforesaid, and then to answer, &c. before the lord the king at Westminster, come as well the said William Foster and William Hawkisford by their attorney aforesaid, as the said Thomas Hall by John Lilly his attorney, and the said Thomas Hall defends the force and injury when, &c. and all contempt, &c. and whatsoever, &c. and says, that he hath not prosecuted the plea in the said court christian against the royal prohibition to him to the contrary thereof before directed and delivered, as the said William Foster and William Hawkisford, who as well, &c. above by their declaration aforesaid suppose: And of this he puts himself on the country: And the said W. Foster and W. Hawkisford thereof likewise, &c. But to have the writ of the said lord the king of consultation in this behalf, the said Thomas says, that he the said Thomas for the time of the substraction of the tithes in the declaration aforesaid above specified was and yet is vicar of the parochial church of Bushbury aforesaid in the county aforesaid; and the same Thomas farther says, that all and singular the vicars of that church for the time being have had and received, and for time immemorial have been accustomed to have and receive of all the occupiers, tenants and farmers of the said messuage and tenements, called Wobaston farm in the parish of Bushbury aforesaid, in the declaration aforesaid above-mentioned, all the tithes of whatever wool, lambs, pigs, geese, milk, calves, flax, apples, pears and plumbs, and also all Easter-offerings for the occupiers of the messuage aforesaid, and for the same messuage and garden aforesaid, and also all other small tithes whatsoever happening, renewing or arising in their proper kind yearly, or every occupier, tenant and farmer of the said messuage and tenements called Wobaston farm aforesaid, with the same vicar or his farmer thereof for the time being for the same tithes yearly have compounded; and because the said William Foster and William Hawkisford, being inhabitants within the parish of Bushbury aforesaid in the county aforesaid, the said tithes in the months and years in the declaration aforesaid mentioned within the parish of Bushbury aforesaid happening, renewing, growing and arising to the said Thomas Hall, vicar of the church aforesaid, in the right of that church in the same years belonging, had from the said Thomas Hall substracted, the said Thomas Hall them the said William Foster and William Hawkisford in the court christian, before the said judge spiritual, of and for the substraction of those tithes in the said months and years in the declaration aforesaid specified, before the prohibition of the said lord the king to him to the contrary directed and delivered, did draw in plea, as he lawfully might; without this, that all and singular the occupiers, tenants and farmers of the said messuage, garden, 100 acres of land, 40 acres of meadow, and 200 acres of pasture with the appurtenances, called Wobaston farm, in the parish of Bushbury aforesaid in the county aforesaid, from time immemorial have paid, and been accustomed to pay, to the vicar of the parochial church of Bushbury aforesaid for

the time being, or his farmer of that vicarage yearly, the annual sum of 15 *s.* of lawful money of England, in full contentation, satisfaction and payment of all and singular the tithes whatever of wool, lambs, pigs, geese, milk and calves, flax, pears, apples and plumbs, of and from the said messuage and tenements aforesaid with the appurtenances, called Wobaston farm aforesaid, howsoever happening, renewing or arising, as also of all and singular Easter-offerings for the occupier of the messuage aforesaid, and the said messuage and garden aforesaid, and also of all other small tithes whatsoever to the vicar of the vicarage aforesaid for the time being of and from the tenements aforesaid yearly payable, as the said William Foster and William Hawkisford by their declaration aforesaid above suppose: And this he is ready to verify: Wherefore he prays judgment, and the writ of the said lord the king of consultation to him in this behalf to be granted, &c.

And the said William Foster and William Hawkisford, who as well, &c. say, that by any thing by the said Thomas Hall above in pleading alledged, the writ of the lord the king of consultation to the said Thomas Hall ought not to be granted, because, as before they say, that all and singular the occupiers, tenants and farmers of the said messuage, garden, 100 acres of land, 40 acres of meadow, and 200 acres of pasture with the appurtenances, called Wobaston Farm in the parish of Bushbury aforesaid in the county aforesaid, from time immemorial have paid, and been accustomed to pay, to the vicar of the parochial church of Bushbury aforesaid for the time being, or his farmer of that vicarage yearly, the annual sum of 15 *s.* of lawful money of England, in full contentation, satisfaction and payment of all and singular tithes whatsoever of wool, lambs, pigs, geese, milk, calves, flax, apples, pears and plumbs, of and from the said messuage and tenements aforesaid with the appurtenances, called Wobaston farm aforesaid, howsoever happening, renewing or arising, and also of all Easter-offerings for the occupiers of the messuage aforesaid, and for the said messuage and garden aforesaid, and also of all other small tithes whatsoever to the vicar of the vicarage aforesaid for the time being, of and from the tenements aforesaid yearly payable, in manner and form as the said William Foster and William Hawkisford by their declaration aforesaid above suppose: And this they pray may be enquired of by the country: And the said Thomas likewise, &c. Therefore as well to try the issue aforesaid, as the said other issue between the parties aforesaid above joined, let a jury thereon come before the lord the king at Westminster on Wednesday next after the octave of the Purification of the Blessed Mary; and who neither, &c. to recognize, &c. because as well, &c. The same day is given to the parties aforesaid there, &c.

Stafford, to wit. The jury between William Foster the younger and William Hawkisford, who as well for the lord the king as for themselves prosecute by their attorney, plaintiffs, and Thomas Hall, clerk, vicar of the vicarage of the parochial church of Bushbury aforesaid in the county aforesaid, defendant, in a plea, why he prosecuted a plea against them the said William Foster and William Hawkisford in the court christian after the royal prohibition to him first to the contrary thereof directed and delivered, is put in respite until Wednesday next after 15 days of Easter, unless the justices of the said lord the king, assigned to take assizes in the county aforesaid, shall first come on Tuesday the 24th day of March at Stafford in the county aforesaid, by the form of the statute, for want of jurors, &c. and let the sheriff have the bodies, &c. The same day is given to the parties

aforesaid there, &c. And be it known, that the writ of the lord the king thereof on the 12th day of February in this same term before the lord the king at Westminster is delivered of record to the under-sheriff of the county aforesaid, in form of law to be executed at his peril, &c.

Afterwards the day and place within contained before Samuel Eyre, knt. one of the justices of the said lord the king, assigned to hold pleas before the king himself, and Thomas Bretton, esquire, to the said Samuel Eyre and Thomas Rokeby, knight, another justice of the said lord the king, assigned to hold pleas before the king himself, justices of the said lord the king, assigned to take assizes of the county of Stafford, by the form of the statute, &c. this time associated, the presence of the said Thomas Rokeby being not expected, by virtue of the writ of the said lord the king of *Si non omnes*, &c. come as well the within named William Foster and William Hawkisford, who as well for the lord the king as for themselves prosecute, as the within written Thomas Hall by their attornies within contained; and the jurors of the jury, whereof mention is within made, being called, some of them, to wit, Richard Wilkes, Thomas Fieldhouse, T. P. and J. P. come, and on that jury are sworn; and because the rest of the jurors of that jury have not appeared, therefore others from the by-standers by the sheriff of the county aforesaid hereto elected, at the request of the said William Foster and William Hawkisford, and by the command of the justices aforesaid, are added anew, whose names are put to the panel within written, according to the form of the statute in such case made and provided: which said jurors so added anew, to wit, J. Palmer, J. C. T. P. T. C. T. H. L. D. J. K. and T. C. being called likewise come, who to say the truth of the within contained, together with the other jurors aforesaid first impanelled and sworn, being elected, tried and sworn, say upon their oath, that all and singular the occupiers, tenants and farmers of the within written messuage, garden, 100 acres of land, 40 acres of meadow, and 200 acres of pasture with the appurtenances, called Wobaston farm in the parish of Bushbury within written in the county aforesaid, for time immemorial have not paid, or been accustomed to pay, to the vicar of the vicarage of the parochial church of Bushbury aforesaid for the time being, or his farmer of that vicarage yearly, the annual sum of 15*s* of lawful money of England, in full contentation, satisfaction and payment of all and singular tithes whatever of wool, lambs, pigs, geese, milk, calves, flax, apples, pears and plumbs, of and from the said messuage and tenements aforesaid with the appurtenances, called Wobaston farm aforesaid, howsoever happening, renewing or arising, and likewise of all Easter-offerings for the occupiers of the messuage aforesaid and garden aforesaid, and also of all small tithes whatever to the vicar of the vicarage aforesaid for the time being, of and from the tenements aforesaid yearly payable, as the said Thomas within for himself in pleading hath alledged: Therefore, &c.

Judgment for the defendant.

No. LI.—P. 278.

Form of a Writ of Assize of Novel Disseisin.

George the Third, &c. To the sheriff of W. greeting: A. B. hath complained to us, that C. D. unjustly and without judgment hath disseised him of his free tenement or freehold in, &c. within thirty years now last past; and therefore we command you, that if the said A. makes you secure in prosecuting his claim, then that you cause the said tenement to be reseised of the chattels which in it were taken, and the same tenement with its

chattels to be in peace, until the next assizes, when our justices into these parts shall come; and in the mean time do you cause twelve free and lawful men of that venue or neighbourhood to view the said tenement, and their names to be impanelled, and summon them by good summoners, that they be before our said justices at the said assizes, ready to make recognizance thereof; and put by sureties and safe pledges the said C. or his bailiff, if he shall not be found that he then be there to hear that recognizance, and have you there the summoners, the names of the pledges, and this writ. Witness, &c.

No. LII.—P. 297.

8 and 9 Wm. III. c. 11. A. D. 1667.

An Act for better preventing Frivolous and Vexatious Suits.

The III. section whereof is —And be it further enacted by the authority aforesaid, that from and after the said five and twentieth day of March, in all actions of waste, and actions of debt upon the statute for not setting forth of tithes, wherein the single value or damage found by the jury shall not exceed the sum of twenty nobles, and in all suits upon any writ or writs of *scire facias*, and suits upon prohibitions, the plaintiff obtaining judgment, or any award of execution after plea pleaded or demurrer joined therein, shall likewise recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same in like manner as aforesaid.

No. LIII.—P. 324.

Copy of the Original Endowment, extracted from the Registry of the Lord Bishop of Lincoln,

Archediaconat' Lincoln' Ordinatio Vicariæ de Quappelad.

Universis Christi fidelibus presentem paginam inspecturis, Ricardus miseratione divina Lincoln' Episcopus, salutem in Domino sempiternam, ad universitatis vestræ notitiam per presentem scripturam volumus pervenire, quod cum dilecti in Christo filii religiosi viri abbas et conventus Croyland, gratum consensum et assensum claræ et recolendæ memoriæ beati hugonis quondam predecessoris nostri ac etiam sanctissimi honorii ecclesiæ Romanæ quondam summi pontificis super *hoc* confirmationem de ecclesia de quappelad cujus fuerunt et sunt patroni in proprios usus habenda, dudum optinuissent, sicut in eorum instrumentis plenius continetur, nosque precibus devotissimis et sæpius iteratis ut hujus concessioni et gratiæ per dictum predecessorem nostrum gravitate religionis suadente favorabiliter eis factæ nostrum consensum et assensum favorabilem in premisses benignius impartiri curaremus pulsaverint, sollicitaverint ac sollicitudine quam potuerunt interpellaverint. Nos demum devotionem dictorum religiosorum specialem et sinceram in Domino dilectionem quas erga venerabilem ecclesiam nostram Lincoln' ipsiusque pontifices semper habuisse dicunter, attendentes, eorum dignis postulationibus et precibus animum nostrum duximus facilius inclinare et celerius postulata concedere.

Cum igitur in monasterio Croyland religionis gravitas, ordinis observantia, perseverantia sanctitatis, ac precipue hospitalitatis gratia, quæ in eo augere noscuntur ipsum monasterium reddant et reddere debeant omnibus graciosum. Nos ad memoriam revocantes quod gratis gratiam postulantibus non sit aditus gratiæ precludendus; de dilectorum in Christo filiorum

Willmi. de Lessington decani et capituli nostri' Lincoln' assensu et grato consensu concurrente divinæ pietatis intuitu et specialiter ad divini cultus officium inibi ampliandum, dedimus, concessimus, et presenti carta nostra, confirmavimus monasterio Croyland et monachis ibidem Deo jugiter famulantibus ecclesiam de Quappelad in qua jus optinent patronatus in proprios usus suos in perpetuum possidendam cujus quidem ecclesiæ proventus et redditus in hujusmodi usus convertant et absque cujuslibet impedimento licite convertere valeant in futurum, vicario tamen in eadem ecclesia perpetuo servituro, in qua vigere ordinamus et constituimus vicariam de ipsius ecclesiæ proventibus pro sua sustentatione suorumque ministrorum et pro oneribus supportandis porcione congrua reservata; porciones autem dictorem abbatis et conventus ac vicarii prelibati per eosdem nobis et successoribus nostris cum ipsam vicariam, vacare contigerit, presentandi, ita duximus, auctoritate pontificali distinquendas, vidilicet, quod.

Abbas et conventus supradicti habeant, totam decimam garbaram ipsius ecclesiæ de Quappelad cum tota dominica terra juribus et appendiciis suis ad ipsam ecclesiam qualitercumque spectantibus, totamque decimam lini et canopi pure et absolute, insuper habeant et quiete percipiant totam decimam lanæ et agnorum de tota parochia provenientam; in velleribus lanæ scilicet et agnorum corporibus consistentem.

Vicarius autem nobis et successoribus nostris per predictos abbatem et conventum ad dictam vicariam successive pro tempore presentandus per hanc ordinationem nostram, ratione vicariæ percipiet et habebit in perpetuum totum alteragium dictæ ecclesiæ de Quappelad et totum emolumentum ab eodem alteragio, Quilitercunque proveniens, quocunque nomine censeatur & in quibuscunque consistat vel consistere poterit, absolute et inconcusse, decimis garbarum lini, canopi, lanæ et agnorum et etiam tota Dominica terra cum juribus suis et appendiciis ut predictum est *duntaxat exceptis*. Habebit etiam idem vicarius et percipiet totam decimam feni totius parochiæ integre et sine omni diminutione et absque impedimento abbatis et conventus predictorum.

Habebit insuper redemptiones lanæ et agnorum ubicumque in parochia a numero quinario et sic inferius descedendo computando, ubi scilicit secundum consuetudinem loci ad decimam velleris et agni non poterit aliquatenus pervenire, omnimodi decima tam lanæ quam agnorum ultra quinarium numerum ascendendo proveniente juxta consuetudinem supradictam penes prefatos abbatem et conventum ut pretactum est totaliter remanante, super quo dolum et fraudem ab aliquo fieri sub pena majoris sententiæ firmiter inhibemus.

Cæterum ordinamus quod abbas et conventus prenominati inveniant vicariis pro loco et tempore successive instituendis, mansum competentem in loco congruo per eosdem abbatem et conventum in principio primi vicarii post cessionem vel decessum simonis nunc ipsius ecclesiæ de Quappelad vicarii in proximo instituendi constructum et competenter edificatum, deinceps si casus fortuitus, necessitas vel vetustas hoc exigat per vicarium qui pro tempore fuerit reficiendum, vel de novo faciendum cum oportuerit in loco prius assignato. Ordinamus insuper quod primus vicarius post cessionem vel decessum dicti simonis suo perpetuo per episcopum instituendus et omnes successores sui qui pro tempore fuerint onera ordinaria episcopalia et archidiaconalia debita et consueta sustineant et agnoscant, quodque libros, vestimenta et cetera ornamenta ecclesiastica necessaria et cancellum ecclesiæ cum reparationem indiguerit sumptibus suis reparent et inveniant ac etiam omnes ministros ad deserviendum vicariæ prelibatæ necessarios exhibeant et sustineant: hanc autem ordinationem nostram in omnibus et

singulis articulis supradictis volumus et ordinamus vires habere perpetuas, salvis in omnibus episcopalibus consuetudinibus et Lincoln' ecclesiæ dignitate. Ut autem ordinationi nostræ presenti plena fides adhibeatur et dictis abbati et conventus vicariisque futuris perpetua securitas præparetur presentem paginam nostro sigillo fecimus communiri. Actum mense Januarii anno gratiæ milessimo ducentissimo sexagessimo octavo et pontificatus nostri anno undecimo.

No. LIV.—P. 331.

Form of Terrier.

A true note and terrier of all the glebes, lands, meadows, gardens, orchards, houses, stocks, implements, tenements, portions of tithes, and other rights, belonging to the vicarage and parish church of Orton, otherwise Overton, in the county of Westmorland, and diocese of Carlisle, now in the use and possession of Richard Burn, clerk, vicar of the said church; taken, made, and renewed according to the old evidences and knowledge of the ancient inhabitants, this tenth day of November, in the year of our lord one thousand seven hundred and forty nine, by the appointment of the right reverend father in God Richard lord bishop of Carlisle, at his primary visitation held at Appleby in the said county and diocese aforesaid, the eighth day of June in the same year, and exhibited before the reverend and worshipful John Waugh, doctor of laws, chancellor of the aforesaid diocese, on the twentieth day of November, in the year aforesaid.

Imprimis, One slated dwelling house, in length fifty one feet, in breadth nineteen feet, within the walls. One thatched barn, stable, cow-house, and peat house, contiguous to each other under the same roof; in length eighty one feet, in breadth twenty one feet, without the walls. One other little stable, in length thirteen feet, in breadth twelve feet and an half; adjoining to the peat house at the south-west side and end. *Item*, The church yard, containing three roods, and nineteen perches; adjoining to the grounds of Robert Teasdale on the south, of Richard Alderson on the west and north, and to a close belonging to the said vicarage, called prior garth, on the east: the walls and gates thereof round about made by the parish. *Item*, one inclosure called prior garth, containing three roods and seven perches; adjoining to the church lane on the south, to the church yard on the west, to the ground of Richard Alderson on the north, and to the highway on the east: through which there lies a foot path from the vicarage house to the church, but for no other purpose: the wall and hedge on the south, north, and east made by the vicar; and on the west, where it adjoins to the church yard, by the parish. *Item*, one garden, containing one rood and eleven perches; adjoining to the vicarage garth, and to the ends of the barn and of the dwelling house, on the south; to the highway on the west, and north; and to the said garth on the east: the fence round about made by the vicar. *Item*, one parrock, containing twenty four perches and an half; adjoining to Orton green on the south, to the highway on the west, to the end of the dwelling house on the north, and to the vicarage garth on the east: the fence round about made by the vicar. *Item*, one garth, containing one acre, fifteen perches and an half; adjoining to the grounds of John Powley, Daniel Teasdale, and Orton green on the south; to the said parrock, barn, and garden on the west; to the peat house end, garden, and highway on the north; and to a close belonging to the said vicarage, called corn close, on the east: the fence round about made by the vicar, except that John Powley makes the fence where it ad-

joins to his ground, and Daniel Teasdale from thence to the bottom of the old lime kiln: through which garth lies a foot path for the said John Powley and Daniel Teasdale to and from their said grounds, and likewise a driving way for their sheep; which they frequented whilst the common field was uninclosed, but is now become almost useless. *Item*, one inclosure called corn close, containing one acre, one rood, and twenty one perches; adjoining to the said John Powley's lane, and to a piece of ground before his barn called a stee-room, and to his garth, on the south; to the vicar's said garth, on the west; to the highway on the north; and to the highway and John Powley's lane on the east: the fence all about made by the vicar, except where it adjoins to John Powley's garth and barn. All which said corn close, garth, garden, and parrock, have been inclosed ground for time immemorial, and the vicar in respect thereof hath not repaired any part of the highways adjoining thereunto. Opposite to the same, on the north side, is an inclosure made by Daniel Teasdale, about nine years ago, by which the highway was made into a lane. *Item*, one inclosure called foredale, containing three acres and fifteen perches: adjoining to the grounds of Robert Teasdale and John Nelson on the south, of John Nelson on the west, of John Powley and Robert Teasdale on the north, and of Robert Teasdale on the east: all the fence made by the vicar, except where it adjoins to the said John Nelson's inn-croft, and except half the length of the said John Nelson's out-croft, from the middle to the east end, the said John Nelson's fence being stone wall: from the east end of which inclosure lies a way through Robert Teasdale's ground, which the present incumbent purchased of the said Robert Teasdale, to an inclosure belonging to the said vicar (but not to the vicarage,) called long roods; which is to continue for ever, and may be of use if at any time hereafter the said two inclosures (foredale and long roods) shall be occupied by the same person, or otherwise. *Item*, one other inclosure, called the greater mil-brow, containing one acre, three roods, and seven perches; adjoining to the ground of John Powley on the south, to a tillage way enjoyed and repaired by the said vicar on the west, to the ground of Thomas Ireland on the north, and of John Powley on the east: all the fence made by the vicar, except about sixteen yards of stone wall at the north east end, belonging to John Powley. *Item*, one other inclosure, called little mil-brow, containing twenty eight perches; adjoining to the ground of John Powley on the south, of Isabel Atkinson on the west, of Isabel Atkinson and Thomas Ireland on the north, and the said tillage way on the east: the fence all made by the vicar: through the south west corner of which inclosure is the ancient water course. The said three last inclosures were made out of the common field by the present incumbent. *Item*, one other inclosure, called glebe close, lying at Firbiggins, containing eight acres and three roods; adjoining to the ground of Elizabeth Turner on the south, of Elizabeth Turner and William Thwaytes on the west, of William Thwaytes on the north, and to the common on the east: the wall at the east end is made by the vicar, at the west end by Elizabeth Turner and William Thwaytes: the right of repairing the fence on the north side, and on the south side is in dispute, and not yet determined. At the end of Elizabeth Turner's house, on oak gate is to be maintained by the owners of coat garth; for which they enjoy a liberty of ingress and egress for themselves and families, and liberty of driving cattle in the winter from martinmas to lady day, doing as little damage as may be; and of passing with peats or other firing in summer. Belonging to the said glebe close, and occupied therewith, there is likewise a parcel of ground, leading from the said gate at Elizabeth

Turner's house end, north-eastward, to the said glebe close, having the wall on the left hand, and mered out from Elizabeth Turner's ground on the right, in breadth three yards and upwards, being the way to and through the said glebe close. *Item*, another parcel of ground, in the common field, called north lands, containing two roods and five perches; adjoining to the ground of Robert Teasdale on the south, of John Nelson on the west and north, and of Robert Teasdale on the east. *Item*, Another parcel of ground in the common field, called pot-lands head, containing one rood; adjoining to the ground of Robert Teasdale on the south, of Elizabeth Waller on the west down by the runner, of John Nelson on the north, and of Robert Teasdale on the east. All which said lands, containing in the whole nineteen acres and upwards, are situate within the lordship and manor of Orton, free from the payment of any fines, rents, or services to any chief lord; the royalties of which said lands are also in the vicar. *Item*, a parcel of peat moss in Orton low moor, containing by estimation, ten acres, known by the name of the vicar's moss.

Item, to the said vicarage is also belonging the tithe of wool throughout the parish; and the manner of tithing is this: the owner lays his whole year's produce in five parcels or heaps; the vicar, or person employed by him, chuseth one of the five heaps, which he pleaseth, and divides the same into two parts; of which two parts the owner chuseth one, and leaves the other to the vicar for his tenth part. *Item*, the tithe of lambs in their proper kind throughout the parish, and the custom concerning them is this: if a person's number is one, he pays a penny; if two, he pays two pence; if three, he pays three pence; if four, he pays four pence; if five, he pays half a lamb; if six, a whole lamb, the vicar paying back four pence; if seven three pence; if eight, two pence; if nine, one penny; if ten, the vicar hath a lamb complete: and in like manner for every number above ten. And if a man's number is under fifty, the tithe is taken thus; the owner takes up two, then the vicar takes one; next the owner takes nine, then again the vicar one, and so on, till the vicar hath taken the number due to him: if they are fifty, or upwards, they are put into a place together, and run out singly through a hole or gap; the two first that come out are the owners; the third the vicar's; then the owner has the next nine; then the vicar one; and so on, till the vicar hath his number. And if sheep are sold in the spring, the tithe of lambs is paid by the person with whom they were lambed, whether seller or buyer. *Item*, the tithe of geese, taken up about michaelmas, in the same manner as the lambs; except that whereas a penny is paid on the account of each odd lamb, an halfpenny is paid for each odd goose. *Item*, the tithe of pigs in like manner. *Item*, the tithe of eggs about Easter; two eggs for each old hen and duck, and one egg for each chicken and duck of the first year. *Item*, by every person who sows hemp, is paid yearly one penny. *Item*, for each plough is paid yearly one penny. *Item*, by every person keeping bees is paid yearly one penny. *Item*, an oblation of four pence at every churching of women. *Item*, for every wedding by publication of banns, one shilling; by licence, ten shillings. *Item*, for every funeral (without a sermon) six pence. *Item*, mortuaries, according to act of parliament. *Item*, for every person of age to communicate, three halfpence yearly, due at Easter. *Item*, a pension of twenty shillings yearly out of the rectory of Sedbergh in the county of York. ——— The glebe, tithes, and profits of the vicarage, are worth at the improved value, communibus annis, about ninety pounds a year.

There is also due to the parish clerk; for every family keeping a separate fire, three pence yearly. For every wedding by publication, or by

licence, one shilling. For every funeral sixpence. For every proclamation in the church yard two pence.

To the sexton for making a grave, six pence.

Belonging to the said parish ——— are, first, the parish church, an ancient building, containing in length (with the chancel) ninety six feet, in breadth forty eight feet: the chancel in breadth one part thirty feet, the other part twenty one feet. The steeple fifteen foot square within the walls, in height sixty feet. Within, and belonging to which, are, one communion table with a covering for the same of green cloth. Also one linen cloth for the same, with two napkins. Two pewter flaggons. Two silver chalices, weighing about ten ounces each. One paten. One bason for the offertory. One table of degrees. One chest with three locks, in the vestry; of little use because of the damp. One pulpit and reading desk, made in the year 1742. One pulpit cushion, covered with green cloth. One large bible of the last translation. Two large common prayer books. The book of homilies. Comber on the common prayer, and Tillotson's first volume of sermons, given by Mr. Thomas Hastwell, merchant in London, 1703. The king's arms with the ten commandments. One church clock. Four bells with their frames: the first, or least bell, being two feet seven inches and an half in diameter; with this inscription [Jesus be our speed, 1637.] The second, two feet and eleven inches in diameter, with an ancient inscription [*omnium animarum,*] perhaps by a mistake of the bell-founder for [*omnium sanctorum,*] to whom the church is dedicated: the third, three feet and two inches in diameter; with this inscription [*soli deo gloria,* 1637.] The fourth, or largest, three feet six inches and an half in diameter; with this inscription [*Mr. Tho. Nelson, vicar. John Bowness. John Winter.* 1711.] Two biers. One herse cloth. Two surplices. Three parchment register books; one, beginning in 1596 and ending 1646, imperfect; the second, beginning 1654, and ending 1743, complete; the third, beginning 1743, and continued to the present time. The seats in the church and chancel (except the vicar's pew) have been repaired for time immemorial at the publick expence of the parish. There are also several new common seats erected this year by the churchwardens, at the low end of the church, adjoining to the belfry. ——— There is also belonging to the said parish, the rectory thereof, together with the tithes of corn, hay, calves, milk, and other dues, which did formerly belong to the priory of Conieshead in Lancashire, and after the dissolution of monasteries were purchased by the inhabitants. ——— Also the advowson of the vicarage, which did belong to the said priory, and was likewise purchased with the rectory. ——— Also one box with three locks, in the keeping of John Unthank of Orton; in which are the purchase deeds of the rectory and advowson; a copy of the endowment of the vicarage in 1263; the purchase deeds of the manors of Orton and Raisbeck by the inhabitants; bounder rolls; and other public writings. ——— There is also belonging to the said parish, one inclosure in the lordship of Raistock, called barrough close, containing by estimation fifteen acres, of the yearly rent of six pounds; adjoining to the river Lune on the south, to the ground of Thomas Fothergill on the west, to the common on the north, and to the grounds of Leonard Scaife on the east: the fence on the south made by the parish; on the west by the parish and Thomas Fothergill, each a part; on the north, by the parish: and on the east by the parish and Leonard Scaife, each a part. ——— Also the sum of twenty pounds, in the hands of Thomas Winter of Wood-end, given by John Dalston, esquire, of Acornbank. Also, the sum of three pounds ancient poor stock,

in the hands of the administrators of the late George Overend of Raisbeck. Also the sum of ten pounds, now in the hands of the vicar, given by Daniel Wilson, esquire, of Dalham Tower. Also the sum of five pounds, in the hands of Mr. Edward Branthwaite of Carlingill, given by him towards a fund for the poor stock. Also the sum of five pounds in the hands of Thomas Hodgson of Tebay-gill Edge, given by Mr. Robert Harrison of Low Seailes, deceased, for the same purpose. The interest of which money, and the rent of which inclosure, are applied by the churchwardens and overseers of the poor, by the direction of the twelve, to the relief of the poor, and defraying other parish charges. Which said twelve men are chosen yearly in Easter week at a vestry meeting by a majority of votes, to be sidesmen and a select vestry for the year ensuing.

There are also three schools in the said parish. One at Orton, lately built by the inhabitants, and endowed by Agnes Holme of Orton, widow, with a parcel of land lying in Orton field, containing by estimation one acre, of the present yearly rent of ten shillings; adjoining to the grounds of Christopher Parker on the south, west, and east, and to a land belonging to the vicarage of Burgh on the north: endowed also by Robert Wilson of Long Sleddale, yeoman, with the sum of five pounds, now in the hands of Thomas Green of Langdale. ——— Another school at Tebay; founded by Robert Adamson of Blacket Bottom in Grayrigg, gentleman, in the year 1672, and endowed by him with the estates called Ormondie Biggin and Blacket Bottom in Grayrigg, now of the yearly rent of sixteen pounds. ——— Another school at Greenholme, founded by George Gibson of Greenholme, gentleman, in the year 1733, and endowed by him with four hundred pounds original bank stock; of the yearly produce of about twenty two pounds.

In testimony of the truth of the before mentioned particulars, and of every of them; we, the minister, churchwardens, and principal inhabitants, have set our hands the said tenth day of November, in the year of our lord one thousand seven hundred and forty nine.

Ri. Burn, vicar.

Joseph Powley
John Bowness
Edmund Dent
Stephen Matthews
George Wilson
Will. Rowlandson
} Churchwardens.

John Unthank
John Nelson
John Bowness
Robert Bowness
John Wilson
Jonathan Whitehead
Edward Branthwaite
Thomas Brown
John Wilson
William Atkinson
John Barrer
} Eleven of the twelve, one of them being dead.

No. LV.—P. 331.

The Form of an Old Deed of Composition.

"Hæc indentura facta inter Willielmum dominum Paget, baronem de Beandesert, verum et indubitatum patronum vicariæ perpetuæ ecclesiæ parochialis de Stapenhill in comitatu Derbiæ, Litchfeldiæ et Coventriæ diocesi, et Johannem Lucas, artium magistrum, vicarium perpetuum ejusdem vicariæ perpetuæ ecclesiæ parochialis de Stapenhill antedictâ, ex consensu et assensu reverendi in Christo patris et domini, domini Thomæ providentiâ divinâ Litchfeldiæ et Coventriæ episcopi, ex unâ parte, Samuelem Sanders de Caldwall, in comitatu et diocesi prædictis, armigerum, Edwardum Holland, de iisdem, generosum, Elizabetham Aston, viduam, Thomam Webster, Thomam Callingwood, Willielmum Cox, Georgium Thrumpton, de iisdem, yeomen, Thomam Baxter, Ricardum Capenhurst, Thomam Baker, de iisdem, husbandmen, Thomam Jackson, de iisdem, carpenter, Thomam Corbitt, de iisdem, blacksmith, aliosque omnes incolas dictæ villæ de Caldwall prædictâ, Ricardum Bath de Linton in comitatu Derbiæ prædicto, et Robertum Nicklinson de Swadlincote in comitatu et diocesi prædictis, husbandmen, et Willielmum Lowe de Burton super Trent in comitatu Staffordiæ, et diocesi prædictâ, shoemaker, proprietarios et occupatores quarundem terrarum, infra eandem villam de Caldwall prædictâ jacentium, ex consimili consensu et assensu reverendi in Christo patris et domini, domini Thomæ providentiâ divinâ Litchfeldiæ et Coventriæ episcopi, ex alterâ parte; testatur, quòd tam pro bono capellæ de Caldwall infra villam de Caldwall prædictam et inhabitantium villæ prædictæ, quam pro bono ecclesiæ parochialis de Stapenhill prædictâ, de quâ quidem ecclesiâ de Stapenhill prædictâ capella de Caldwall prædictâ membrum est; ac etiam pro, et in consideratione acquietantiæ et finalis concordantiæ, omnium differentiarum et controversiarum, de et concernent, omnes et singulas decimas, oblationes, obventiones, compositiones, aliaque jura, et emolumenta ecclesiastica quæcunque, vicario perpetuo vicariæ perpetuæ ecclesiæ parochialis de Stapenhill prædictâ, per inhabitantes, possessores, et occupatores terrarum, infra villam de Caldwall prædictâ jacentium, debitas et solutas; agreatum, concordatum, et conclusum est, et per præsentes inter partes prædictas, ex consensu et assensu antedicti reverendi in Christo patris, concordatum est et conclusum, quòd præfatus Johannes Lucas, vicarius perpetuus vicariæ perpetuæ, ecclesiæ parochialis de Stapenhill prædictâ, ejusque successores vicarii perpetui ejusdem vicariæ perpetuæ semel in quilibet mense, annuatim, in quolibet anno imperpetuum divinas preces in capellâ de Caldwall prædictâ, secundum formam libri communium precum, leget, et post lectionem earundem, juxta morem ecclesiæ Anglicanæ, concionabitur; præfatique incolæ de Caldwall prædictâ, ac proprietarii et occupatores terrarum infra eandem villam jacentium, omnes et singuli, et eorum hæredes, executores, administratores, sive successores, eidem Johanni Lucas, et successoribus suis vicariis perpetuis ejusdem vicariæ perpetuæ ecclesiæ parochialis de Stapenhill prædictâ, summam sex librarum, legalis monetæ Angliæ, in plenam contentionem, satisfactionem, et exonerationem omnium et omnimodum decimarum, jurium, compositionum, obventionum, oblationum, juriumque, et emolumentorum ecclesiasticorum quorumcunque, infra eandem villam de Caldwall prædictâ, qualitercunque crescentium, provenientium, renovantium, aut aliquo modo contingentium, eidem vicario perpetuo, et quovis modo debitorum, aut solvi consuetorum, ad festum sancti Johannis baptistæ annuatim in quolibet anno imperpetuum solvent; ideamque Johannes Lucas vicarius perpetuus antedictus, ejusque successores, vicarii perpetui vicariæ perpetuæ ec-

clesiæ parochialis de Stapenhill prædictæ, eandem summam sex librarum, in plenam contentationem, satisfactionem, solutionem, et exonerationem omnium et singularum decimarum, jurium, compositionum, obventionum, oblationum, et emolumentorum ecclesiasticorum quorumcunque prædictorum; et, ut præfertur, quovis modo debitorum aut solvi consuetorum imperpetuum ad festum prædictum accipient et recipient: in cujus rei testimonium partes ad presentes sigilla sua iisdem mutuò opposuerunt vicesimo secundo die mensis Septembris, anno regni domini nostri Caroli secundi, Dei gratia, Angliæ, Scotiæ, Franciæ, et Hiberniæ, regis, fidei defensoris, &c. vicesimo octavo, annoque domini 1676. Et nos episcopus antedictus in fidem et testimonium præmissorum sigillum nostrum episcopale presentibus apposuimus. Will. ⋈ Pagett, John ⋈ Lucas, Tho. ⋈ Litch. et Coventr.

Form of a Lease of Tithes.

This indenture made on the first day of January, in the twenty third year of the reign of our sovereign lord George the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth; and in the year of our lord, 1783, between the right reverend father in God, Sir William Ashburnham, baronet, doctor of divinity, rector of Gestling, in the county of Sussex, and lord bishop of Chichester, of the one part, and Thomas Smith of the parish of St. Martins in the fields, within the city and liberty of Westminster, and county of Middlesex, gentleman, of the other part, witnesseth, that the said lord bishop for and in consideration of the rent hereby reserved, and covenants herein contained, hath demised, granted, and to farm letten, and by these presents doth demise, grant, and to farm let unto the said Thomas Smith, his executors, administrators, and assigns, all, and all manner of tithes of corn, grain, hay, and herbage, yearly growing, increasing, or happening, within the said parish of Gestling, and all profits of what kind soever, belonging to the parsonage or rectory, there to have, hold, receive, and take all and every the said tithes and profits, unto the said Thomas Smith, his executors, administrators, and assigns, from the day of the date of these presents, for and during, and unto the full and term of twenty-one years, from thence next ensuing, and fully to be completed and ended, if he the said lord bishop shall so long continue rector of the said parish of Gestling, yielding and paying therefore, yearly, and every year, during the said term, unto the said lord bishop and his assigns, the rent or sum of two hundred pounds, at and upon the four usual feasts or days of payment in the year, (that is to say) the annunciation of the blessed virgin Mary, the nativity of St. John the baptist, the feast day of St. Michael the archangel, and the birth of our Lord Christ, by even and equal portions; the first payment thereof to begin and be made on the annunciation of the blessed virgin Mary, next and immediately ensuing the day of the date of these presents: provided always, that if the said rent or annual sum of two hundred pounds, or any part thereof, shall happen to be behind or unpaid for the space of fourteen days next, over and after any of the said days and times herein before appointed and limited for payment thereof, then and in such case, this present demise, and every clause, article, and thing herein contained, shall cease, determine, and be utterly void, and of none effect, any thing herein contained to the contrary thereof notwithstanding. And the said Thomas Smith doth hereby for himself, his heirs, executors, and administrators, and for every of them, covenant, promise, grant, and agree, to and with the said lord bishop, his heirs, executors, and administrators, and to and with every of them, by these presents in manner following, that is

to say, that he the said Thomas Smith, his executors, administrators, or assigns, shall and will from time to time, and at all times hereafter, during the continuance of this present demise, well and truly pay or cause to be paid and satisfied, the rent or annual sum of two hundred pounds aforesaid, at the days and times aforesaid herein before stipulated of payment thereof; and also that he the said Thomas Smith, his executors, administrators, or assigns, or some or one of them, shall and will truly pay and faithfully discharge all taxes, assessments, and impositions whatsoever, or by whatsoever name or names the same may be described which shall be charged upon the said demised premises, or upon the said lord bishop, in respect of the same, by authority of parliament or otherwise howsoever. And the said lord bishop for himself, his heirs, executors and administrators, and every of them, doth hereby covenant, promise, grant, and agree to and with the said Thomas Smith, his heirs, executors, and administrators, and to and with every of them, by these presents in manner and form following, (that is to say,) That for and under the rent or annual sum of two hundred pounds aforesaid, and of the covenant therein before reserved and contained on the part and behalf of the said Thomas Smith, his executors, administrators, or assigns, to be paid, kept, done and performed, he the said Thomas Smith, his executors, administrators, and assigns, shall and may have, hold, occupy, possess, and enjoy, the tithes and premises aforesaid, and every part and parcel thereof, during the said term, hereby granted, without any let, trouble, molestation, interruption, or denial of him the said lord bishop, or his assigns, or of any person or persons whomsoever, lawfully claiming, or to claim, from, by, or under him, them, or any of them. In witness whereof all the said parties to these presents, have hereunto changeably set their hands and seals, the day and year first above written.

WILLIAM CHICHESTER.

Sealed and delivered, having been first duly stamped in the presence of

No. LVI.—P. 376.

Forms of proceeding under the Acts of Parliament for small Tithes.

Summons for small-Tithes, on the 7th and 8th Wm. III. cap. 6.

Westmorland. To the constable of

Whereas complaint in writing hath been made unto us two of his majesty's justices of the peace for the said county by A. J. of in the said county, clerk, that A. O. of in the parish of in the said county, yeoman, hath, for above the space of twenty days before the time of the said complaint so made unto us as aforesaid, refused to compound for, or pay unto him the said A. J. and hath not yet compounded for, nor paid the small tithes, offerings, oblations, and obventions, justly due from him the said A. O. to him the said A. J. These are therefore to command you forthwith, upon sight hereof to summon the said A. O. to appear before us at the house of in in the said county, on Saturday the day of this present month of at the hour of in the forenoon of the same day, to answer unto the said complaint. And be you then there to certify what you shall have done in the premises. Given under our hands and seals at in the said county, the day of in the year of

Complaint for small Tithes, on the 7th and 8th Wm. III. cap. 6.

To J. P. and K. P. esquires, two of his majesty's justices of the peace in

and for the county A. J. of in the said county, clerk, humbly complaineth.

That the said complainant did, by the space of twenty days and upwards before the day of the date thereof, demand of A. O. of in the parish of in the county aforesaid, yeoman, the small tithes, offerings, oblations, and obventions, justly become due within two years now last past, from him the said A. O. unto him the said complainant, to the value of four pounds; and that the said A. O. did upon the said demand refuse, and doth yet refuse, to pay and compound for, and hath not paid nor compounded for, the same nor any part thereof: The said complainant therefore prayeth such redress in the premises, as to you shall seem meet, and as to the law doth appertain. Signed the day of in the year of . A. J.

Order for Payment of small Tithes, on the 7th and 8th Wm. III. cap. 6.

Westmorland. Whereas complaint in writing hath been made unto us two of his majesty's justices of the peace for the said county, by A. J. vicar of the parish of in the said county, that A. O. of in the said parish of in the county aforesaid, yeoman, did refuse for the space of twenty days next before the time of the said complaint so made unto us as aforesaid, to pay or compound for his tithes, offerings, oblations, and obventions, arising in the said parish of and due to him the said A. J. We therefore the said justices, being neither of us patron of the parish church of aforesaid, nor any ways interested in any of the said tithes, offerings, oblations, or obventions, have duly summoned the said A. O. before us, and having duly examined the truth and justice of the said complaint upon oath, do find that there is justly due from the said A. O. to the said A. J. the sum of four pounds, being the value of the said tithes, offerings, oblations, and obventions, become due within two years last past; and do therefore adjudge and order the aforesaid A. O. to pay or cause to be paid unto the said A. J. the aforesaid sum of four pounds, and also the sum of ten shillings, for the costs and charges of the said A. J. in prosecuting the said A. O. for the recovery of his said just dues. Given under our hands and seals at in the said county, the day of in the year of the reign of .

Distress for small tithes, on the 7th and 8th Wm. III. cap. 6.

Westmorland. To the constables of in the said county, and to the churchwardens of the parish of in the said county, and to every of them.

Whereas upon the complaint of A. J. vicar of the parish of aforesaid, in the county aforesaid, A. O. yeoman, hath been duly summoned to appear before us two of his majesty's justices of the peace for the said county, to be examined for the non-payment of the small tithes, offerings, oblations, and obventions, due unto the said A. J. And whereas we the said justices, being neither of us patron of the parish church of aforesaid, nor any way interested in any of the said tithes, offerings, oblations, or obventions, have duly examined the truth and justice of the said complaint, and have ordered him the said A. O. to pay unto the said A. J. the sum of four pounds, being the value of the small tithes, offerings, oblations, and obventions, become due from him the said A. O. to him the said A. J. within two years next before the said complaint so made unto us as aforesaid, together with the sum of ten shillings, for the cost and charges of the said A. J. for the recovery of his said just dues; making in the whole

the sum of four pounds ten shillings. And whereas it appeareth unto us the said justices, that the said A. O. had due notice of our said order for the space of ten days and upwards before the day of the date hereof, but hath refused to pay, and hath not yet paid the said sum of four pounds ten shillings, nor any part thereof: These are therefore to command you jointly and severally, that you, or some or one of you forthwith distrain the goods and chattels of the said A. O. and in case the said sum of four pounds ten shillings, together with your reasonable charges of making and detaining the said distress, be not paid, or tendered to be paid by him the said A. O. in four days next after such distress made, that then you do make public sale of the said goods and chattels so distrained as aforesaid, and out of the money arising from such sale that you pay or cause to be paid unto him the said A. J. the said sum of four pounds ten shillings, and thereout also deduct and detain your reasonable charges of making, keeping, and selling the said distress; and if any overplus shall remain, after such payment and deduction as aforesaid, that then you do render the same unto him the said A. O. upon demand. Given under our hands and seals at in the said county, the day of in the year of .

No. LVII.—P. 385.

A Bill for Tithes in Chancery.

To the Right Honourable Thomas, Lord Erskine, Baron Erskine of Restormel Castle, in the County Palatine of Cornwall, Lord High Chancellor of Great Britain.

Humbly complaining, shews unto your lordship, your orator J. P. of P. in the county of C. that your orator now is, and for six years last past has been seised in fee, and proprietor and owner of all and every the tithes of corn and grain, and other great and predial tithes whatsoever arising, renewing, increasing, and growing within the townships, hamlets, and vills of W. and A. and the titheable places thereof, in the parish of B. and parcel of the impropriate rectory thereof, in the said county of C. and particularly of the tithes of corn and grain and other great and predial tithes arising, renewing, increasing, and growing in, upon, and within the tenement called B. in A. and W. aforesaid, or one of them, and by reason thereof during all the time aforesaid was and now is justly, rightfully, and lawfully intitled unto and ought to have enjoyed, had, and received, and ought to have, enjoy, and receive, all and every the tithes of corn, grain, and other great and predial tithes arising, renewing, increasing, or growing, or which during the said time, have arisen, renewed, increased, or grown within the said township, hamlets, and vills of W. and A. and either of them, and particularly in, upon, and within the said tenement called B. and also all and every the sums, matters, and things whatsoever, which during the said time, of right, or by any custom within the said township, hamlet, or vills, have been payable as for or on account of tithe, corn, grain, or other great and predial tithes, or which ought to have been so paid or answered. And your orator further shews to your lordship that M. B. widow, and B. her son, jointly and severally, for and during the said space of six years last past, had held, or occupied and enjoyed, the said tenement called B. within A. and W. aforesaid, or one of them, or the lands and grounds thereunto belonging, and other lands and grounds within A. and W. aforesaid, or one of them, or the titheable places thereof in and upon the same, and within the said townships, hamlets, and vills, or one of them, and the titheable places

thereof, and had jointly and severally growing, renewing, increasing, and thence reaped, and had, and took in the said years respectively several quantities of corn and grain, to wit, in each of the said years 100 shocks or hattocks of wheat, the tithe whereof in each year, if duly paid, would have been worth 20*s*. One hundred shocks or hattocks of rye, the tithe whereof was worth in each year other 20*s*. Three hundred hattocks or shocks of oats, the tithe whereof would have been worth in each of the said years, if paid, 30*s*. One hundred and fifty shocks or hattocks of barley, the tithe whereof, if the same had been duly answered, would have been worth 30*s*. One hundred shocks or heaps of beans, the tithe whereof was worth 15*s*. One hundred shocks or heaps of pease, the tithe whereof was worth other 15*s*. Two hundred shocks or hattocks of bigg, the tithe whereof was worth 30*s*. and upwards. All which said several tithes became due and payable from the said M. B. and B. her son, jointly or severally, in each of the said years; and ought to have been justly and duly paid and answered unto your orator as proprietor and owner of the said tithes and premises. But so it is, may it please your lordship, that the said M. B. and B. having entered into a combination and confederacy between themselves, and with several other persons unknown to your orator, who when they shall be discovered, your orator prays they may be made parties hereto, with apt words to charge them, have, and either of them, has neglected, omitted, and refused to set out, pay, satisfy, or answer, and have not, nor has either of them in any of the said years, set out, paid, satisfied, or answered unto your said orator, the said several and respective tithes, or any of them, or made any agreement, composition, or just satisfaction to your said orator for the same, or any thing in lieu thereof, but though in a friendly manner requested thereto, have and has jointly and severally refused to set out the same, or to pay or answer what is justly due to your orator on those accounts, or fairly or justly to set forth, yield, or pay their and either of their said tithe, or to pay and make him any just satisfaction for the same, or for any the tithes substracted and withheld by them, or either of them; but as they have concealed, so they do, and each of them doth endeavour to conceal the said titheable matters, and refuse to discover what lands, tenements, and hereditaments in particular they jointly and severally held, occupied, ploughed, and reaped within the said township, hamlets, and villages in each of the said years, nor what tithes of corn and grain they in each of the said years, or either of them respectively withheld and detained from your orator, nor what is and was the value thereof; and as their reason for so doing, the said confederates sometimes insist, that they have duly paid and answered to your orator the tithes of all and singular the titheable matters, and at other times that they are not nor were liable to the payment of any tithe in kind, but exempt and free from the payment thereof under an ancient *modus* or composition of 10*s*. yearly, or other the like sum payable time immemorial, in lieu of tithes of corn and grain, and other great and predial tithes arising, renewing, increasing, and growing upon and within the said tenement and lands held, enjoyed, sown, and reaped by them in the said several years aforesaid; which *modus* they pretend was paid by them in and for the said several years unto your orator; whereas your orator charges, as the truth is, that the said confederates, or either of them, did not set forth, pay, or answer the tithes due to your orator for the corn and grain reaped, had, and taken by them, which grew upon the said tenements, lands, and premises, or any of them, in or for any of the said years herein before mentioned, nor have they, or either of them, paid or answered any *modus*, pretended *modus*, or composition to your orator for the same, for

any of the said years; and the truth is, as your orator charges it to be, that tithes of corn and grain, and other great and predial tithes arising from the premises are due and payable, and ought to be answered and paid unto your orator in kind; and the said confederates are not nor ought to be exempt from the payment thereof, upon any pretence of a *modus* payable in money, as in lieu thereof, which however was never paid to your orator; and if there was any colour to set up such pretences to a *modus*, yet that is owing to a late agreement, whilst the tithes, as also the said tenement and lands were in the hands of the family of the M.'s, and not any prescriptive *modus*, nor was the said tenement anciently discharged from payment of tithes in kind upon or under payment of any *modus* or sum in lieu of tithes; but tithes in kind were paid and answered as for other the lands or tenements within the said township, till the said tenement and tithes both came into the hands, ownership, or possession of M. or H. in the said county, who settled and conveyed the said tithes upon or unto one of his younger sons, from whom the same descended, and came to R. M. esq. his kinsman, of whom your orator purchased the same; and the said tenement called B. continuing in the ownership of some other of the M.'s near relations to the then proprietors of the said tithes, they on account of kindred, or other motives complied to accept 10*s. per annum*, or other such sum in money for the tithes arising from the said tenement, which being a temporary agreement only, and not any *modus* that had been paid time immemorial, your orator humbly apprehends himself not to be bound or obliged thereby, nor ought the said confederates, nor either of them, who, or one of them, purchased the said tenement, or claim under some purchaser thereof, or have or hath possessed the same during the time aforesaid, to have or claim any discharge or exemption from payment of tithes in kind, or upon or under any such pretences, they or one of them, well knowing or having been informed, or from the papers, books, notes, and memorandums in their keeping or power, may be well satisfied that there was anciently no such *modus* paid or received in discharge of tithes arising from the said tenement; but that which was paid and received as on account thereof was modern and under late agreement and compliance whilst the said tenement and tithes were both in the hands of the family of the M.'s; and the said confederates ought of right and justice to have answered and paid unto your orator their said several tithes for the said titheable matters arising and growing in and upon the said tenement, and within the township, vills, and hamlets as aforesaid; yet the said confederates, and each of them, under some and the like frivolous and unjust pretences as aforesaid, have refused, and do refuse to pay or answer the said tithes or any of them to your said orator, or to make him any just satisfaction for the same, or to make him any full and fair discovery of the titheable matters they severally had within the said townships, hamlets, and vills, and titheable places thereof, in the said several years, or any of them, though they have been severally requested thereto. All which actings, doings, pretences, and designs of the said confederates are contrary to equity and good conscience, and tend to your orator's great wrong and injury. In tender consideration whereof, and for that your orator cannot exactly prove the several natures, kinds, and quantities of the said titheable matters, nor what the said tithes due from them and each of them unto your orator did or might in each of the said years amount unto, but the same being industriously concealed by the said confederates, remain principally in their knowledge; from whence, and the evidence your orator may give, he your said orator well hopes he shall be enabled to make out his charge against the

said confederates, whereupon to be relieved and to obtain satisfaction for the single value of the said tithes substracted and withheld as aforesaid, and to have such other relief and satisfaction as may appear just. To that end therefore, and in order thereto, that the said confederates may, upon their several corporal oaths, true, perfect, and distinct answer make to all and singular the premises, and more especially that they and either of them may discover and set forth what particular lands, tenements, grounds, and hereditaments they jointly and severally had during the said six years, or any and what part thereof held, occupied, or enjoyed within the said township, hamlets, and vills, and each of them, and set forth what parts thereof were in each of the said years sown with corn and grain, and the prices, kinds, and values thereof in each year distinctly, and what corn they jointly and severally reaped, had, cut, or took within the said township, hamlets and vills, and in what years distinctly of the said six years, and what was and were the full value of the tithe thereof in each of the said years distinctly, if the same had been paid in kind; and whether your orator, or some, and who, on his behalf, did not, at some, and what time and times, apply to them, or one and which of them, to set out or answer their, or one, and which of their said tithes, and shew cause, if they can, why they refused so to do; and whether they have not severally neglected or refused to pay or answer the same, or to give any satisfaction or make any composition or recompence to your orator for or in lieu of the tithes, and what were the several tithes of corn and grain grown, reaped, and had by them, and either of them, within the said township, hamlets, and vills, worth, if the same had been justly paid and answered in each of the said six years; and if they, or either of them, shall set up or pretend to any *modus* or composition as for or in lieu of the said tithes, or any of them, that they may shew whether they have paid or tendered the same in any and what years, and when, where, and to whom, and for what years the same is in arrear and unpaid, and what such *modus* is in particular, and to what lands, tenements and grounds the same extends, and which is covered or pretended to be covered thereby, and which not, and when such *modus* or composition commenced, and by and under what agreement, and when and with whom made, and whether, as they severally have heard and believe, the tithes of corn, and grain growing and arising from the said tenements, lands, and premises, or some, and which of them, were not paid, and what in kind; and whether the 10*s.* or other sum pretended to be paid or payable as a *modus* or composition for or in lieu of great tithes, arising from the said tenement and premises, was not by or under some, and what agreement or compliance whilst the said tithes and tenement were in the hands of some of the family of the M.'s, and whether the same was made perpetual or only temporary, and during what time such *modus* or composition was paid and accepted, and by whom and when; and that they may make diligent search amongst all the books, papers, notes, and memorandums in their or either of their custody or power, and set forth what they know, have heard, or can find relating to the said pretended *modus* or payment of tithes in the very words and figures, and shew cause, if they can, why they have severally refused or neglected to set forth, and pay, and answer their and either of their tithes to your orator, or to make him any recompence, compensation, or satisfaction for the same, or for the value, or in lieu thereof; and that the said confederates may, upon a full and just discovery of the premises, be decreed and obliged to pay, satisfy and answer unto your orator all and every the tithes substracted by them and either of them, or the just value thereof, as in every of the said years became justly

due and payable from them and either of them respectively unto your said orator, not desiring to take advantage of the forfeiture of the treble value, but well contenting himself with the single value of the said tithes substracted, withheld, and not paid; and if any *modus* shall be set up and supported, that they may shew in particular to what lands and grounds the same extends, and why they have not paid and answered the same, and may be decreed to make payment thereof, and of the arrears; and that your orator may, upon a full and fair discovery of all and every the matters and things aforesaid, and of the circumstances and particulars relating thereto, upon the oath of the said confederates, be otherwise relieved in all and singular the premises, according to equity and good conscience. May it please your lordship to grant unto your orator his majesty's most gracious writ of *subpœna* to be directed to the said M. B. and B. her son, thereby commanding them, &c.

The Bill for Agistment tithe in the notable case of Bateman v. Aistrup.

Bateman against *Aistrup and others*, Michaelmas Term 1770. To the right honourable Frederick North, esq. commonly called Lord North, chancellor and under-treasurer of his majesty's court of exchequer at Westminster; the right honourable Sir Thomas Parker, knight, lord chief baron of the said court, and the rest of the barons there,

Humbly complaining, sheweth, unto your honours, your orator Thomas Bateman, clerk, debtor and accountant to his majesty as by the records of this honourable court and otherwise it doth and may appear, that on the twenty-eight day of October in the year one thousand seven hundred and sixty eight your orator was duly instituted into the vicarage and parish church of Whaplode in the county of Lincoln; and on the twelfth day of November in the same year, your orator was duly inducted into the same vicarage and parish church; and your orator shortly afterwards duly and lawfully qualified himself for the enjoyment of the said vicarage;—And he hath ever since been and now is true and lawful vicar of the said vicarage and parish church, and as such he ever since the said twelfth day of November, hath been and now is well intitled to all tithes whatsoever arising, growing, increasing or renewing within the said vicarage and parish or the titheable places thereof, and of which the tithes are by any means payable to the vicar thereof. And your orator further sheweth unto your honours, that by ancient endowments, and other lawful ways and means, the vicars of the vicarage and parish for the time being have for a great number of years been intitled to the tithes of hay, and to all trusts and revenues, profits and oblations whatever and howsoever belonging to the said church; except only the tithes of corn, wool, lamb, hemp and flax, all which particulars are due and payable to the governors of the goods, possessions and revenues of the free grammar schools of Robert Johnson, clerk, and of the two hospitals of Christ in Oakham and Uppingham in the county of Rutland for the time being, as impropriate rectors of the said church; save that the vicars of the said church for the time being have been justly intitled to the redemptions of wool and lamb, to wit, from the number five and under &c. &c. &c. And your orator further sheweth unto your honours, that Samuel Aistrup, Robert Collins, Robert Goulding, John Speechley, James Watson and John Watson, all of the said parish of Whaplode now occupy and during all or the greatest part of the time since the said twelfth of November in the year of our Lord one thousand seven hundred and sixty eight have occupied great quantities of land within the said parish, on which they have respectively in each year during their respective occupation thereof

had great quantities of titheable matters, the tithes whereof have been justly due and payable to your orator as vicar of the said parish. And particularly your orator sheweth that they have from time to time in each or most of the years in which they have occupied lands within the said parish as aforesaid, kept, fed and depastured on such their lands a great number of sheep, which they have from time to time fattened thereon, and sent to London or elsewhere for sale or some other purpose; and all or most of such sheep having been kept on such lands for some time after the shearing of such sheep, your orator as vicar of the said parish and by virtue of the said endowment, hath been from time to time intitled to the tithe of the agistment of all such sheep; from the time when the same were last sheared on the said lands, until they were sold off fat or taken out of the said parish for sale or some other purpose before the next shearing time, which tithe is well worth one penny per month for each sheep, the same having been mostly of a very large size. And your orator further sheweth unto your honours that the said Samuel Aistrup, Robert Collins, Robert Goulding, John Speechley, James Watson and John Watson, have in all or most years since the said twelfth day of November in the said year of our Lord one thousand seven hundred and sixty eight had within the said parish or the titheable places thereof, and kept, fed, and depastured many beasts and other unprofitable cattle on such their lands, and they ought to have respectively paid to your orator, the tithe of the agistment of all such beasts and other unprofitable cattle. And your orator further sheweth unto your honours, that the said Samuel Aistrup, &c. &c. from time to time, have failed to deliver or pay to your orator or for his use the several tithes aforesaid; Insomuch that a large sum is now due from each of them to your orator in respect thereof. And your orator hath frequently by himself and his agents in a friendly manner applied to them, and requested them and each and every of them to come to account with your orator concerning the same, and to pay unto your orator the money which will appear due from them respectively to him on the balance of such accounts. And your orator well hoped that such his reasonable request would have been complied with. But now so it is, may it please your honours, that the said Samuel Aistrup, &c. &c. combining and confederating together and to and with the Governors of the goods and possessions and revenues of the free grammar schools of Robert Johnson, clerk, and of the two hospitals of Christ in Oakham and Uppingham in the county of Rutland, who are the impropriators of the rectory of the said church, and with Joseph Blackith of Framton in the said county of Lincoln, and Hurst Fowler of the said county, who are lessees of the said rectory, and divers other persons at present unknown to your orator, whose names when discovered your orator prays may be herein inserted and they made parties hereto, with apt words to charge them, how to injure your orator, and to defraud him not only of the money justly due and owing to him as aforesaid; But also of the future tithes and payments to become due and payable from them respectively to your orator as aforesaid. They the said confederates at some time pretend that no such tithes as aforesaid or any or either of them are or ever were due or payable to the vicar of the said parish; But that the lands occupied by them respectively are in some manner, but by what in particular they refuse to discover, exempt or discharged from any tithes whatsoever, or any recompence in lieu thereof. And at other times they pretend that all the said tithes are due and payable to them the said defendants the governours of the goods, possessions and revenues of the free grammar schools, of Robert Johnson, clerk; and of the two hospitals of Christ in Oakham and Uppingham in the county of

Rutland, as impropriators of the said rectory and church or to them the said Joseph Blackith and Hurst Fowler, or one of them or some other person or persons as lessees or lessee, tenants or tenant of the great tithes of the said parish; whereas your orator charges the contrary of all such pretences to be true and that none of these tithes herein before claimed by your orator, have been at any time delivered, paid or satisfied to or for the use of the said governours, or to the said Joseph Blackith and Hurst Fowler or either of them, or to any lessees or lessee, tenants or tenant under them; or if they have, your orator charges that the person or persons so delivering, paying or satisfying the same, have done it in their own wrong, and that your orator is well entitled thereto, and at other times the said confederates pretend that they have respectively delivered, paid or satisfied all the said tithes to or for the use of your orator. Whereas your orator also charges the contrary of such pretences also to be true, but nevertheless under such or the like pretences as aforesaid or some others equally unjust and unreasonable, the said confederates, the occupiers, refuse to make any satisfaction to your orator for or in respect of any of the said tithes, or to come to any account with your orator for the same: and the said other defendants, or some or one of them, abet and support them or some or one of them therein. All which actings, doings and pretences of the said confederates are contrary to equity and good conscience and tend to the manifest wrong and injury of your orator. In tender consideration whereof and forasmuch as your orator is remediless in the premises by the strict rules of the common law; and cannot have adequate relief therein without the aid and assistance of a court of equity before your honours, where matters of this nature are properly cognizable and relievable: to the end therefore that the said Samuel Aistrup, &c. Joseph Blackith, Hurst Fowler and their confederates when discovered upon their several and respective corporal oaths; and the said governors of the goods, possessions and revenues of the free grammar schools of Robert Johnson, clerk, and of the two hospitals of Christ in Oakham and Uppingham, in the county of Rutland, under their common seal, may full, true, direct and perfect answer make according to the best of their respective knowledge, remembrance, information and belief to all and singular the matters and things aforesaid as fully and particularly as if the same were here repeated and they were thereunto distinctly interrogated; and more especially that they may answer and set forth whether your orator was not at or about the respective times aforesaid or what other times duly instituted and inducted into the said vicarage and parish church of Whaplode; and whether your orator during all, or some, or what part of the time since such induction hath not been, and is not now true and lawful vicar of the said vicarage and parish church. And whether by some and what ancient endowment or other and what lawful ways and means the vicars of the said parish have not been for many years past lawfully intitled to all or some and what profits or revenues belonging to the said church, other than, and except as herein before are mentioned: and whether all or some and which of the titheable matters herein before claimed by your orator, are not justly due and lawfully payable to the vicar of the said parish for the time being; and whether all or any and what kinds thereof are payable to the said governors of the goods, possessions and revenues of the free grammar schools of Robert Johnson, clerk, and of the two hospitals of Christ in Oakham and Uppingham in the county of Rutland, or any, and what persons impropriate rectors of the said rectory as aforesaid, or in any and what other right or their lessees or lessee of the great tithes within the said parish, or their or his tenants or tenant, and whether they the said Joseph Blackith

and Hurst Fowler, or one and which of them are or is not, and how long they, he, or she, have or hath been, and how and by what means lessees or lessee, tenants or tenant; and of or under whom, of all, or some, and what tithes within the said parish; and whether they and the said governors, or any, or either, and which of them, do or doth or ever and when did claim to be and how and in what manner intitled to all or any and which of the tithes herein before claimed by your orator. And that all the said defendants, may set forth whether they the said Samuel Aistrup, &c. &c. or some, or one, or which of them have or hath respectively during the whole, or some, and what part of the time since the twelfth day of November, in the year of our Lord one thousand seven hundred and sixty-eight, occupied some and what particular lands within the said parish of Whaplode and the titheable places thereof, and may set forth all the particulars of such lands, and the quantities, qualities, names and other descriptions thereof, and of whom and under what rents they respectively hold or did hold the same, and whether they the said confederates, the occupiers or some, or one and which of them have or hath not in all or some and what years since the said twelfth day of November in the year of our Lord one thousand seven hundred and sixty eight, kept, fed and depastured some and what number of sheep on the lands occupied by them respectively within the said parish or the titheable places thereof; and on what days they have respectively sheared their sheep on such lands in each year since such time; and whether in each or any or either and which of the years since such time, they or some, or one and which of them have or hath not kept all, or some and what number of the sheep so sheared by them on such lands, or some and what parts thereof for the purpose of fattening them for sale or for what other purpose: and whether such sheep were not afterwards taken off from such lands before the next shearing time; and that they may respectively set forth the particular number of sheep which in each year were fed, kept and depastured on their respective lands in the said parish or titheable places thereof, only part of the year after shearing time and then taken off therefrom for sale or any other purpose; and how long time they continued on such lands in such years after the shearing; and how much money per month the agistment or feeding of each sheep was worth during such times; and the value of the tithes thereof. And that they may also set forth how many beasts or other unprofitable cattle they have respectively had, agisted or fed, and how long in each year since the time aforesaid, on lands occupied by them respectively within the said parish or the titheable places thereof, and how much money per month the agistment or feeding of each beast or other unprofitable cattle was worth during such time, and the value of the tithe thereof. And that all the said confederates may set forth, whether all or any and which of the lands within the said parish or the titheable places thereof belonging to or occupied as aforesaid by them or any or either and which of them, are by any and what means exempt or discharged from the payment of tithes or from making any satisfaction for tithes of or for all or any and either and which of such tithable matters or things, and how and when the same become so. And whether they the said confederates or any or either and which of them have or hath and when and how made satisfaction and to whom and for whose use, for the tithes of all or any and which of the tithable matters and things aforesaid arising on their said lands or any and what part thereof in all or any and which of the years aforesaid and for what uses and by what right, and if not, why not. And whether your orator, or some and what person or persons on his behalf hath or have not, and how often and when and in what man-

ner applied to them, or some or one and which of them for such or the like purposes as aforesaid or some, or one and which of them. And whether they or some, or one and which of them have or hath not, and when and how often, and in what manner, and for what reason, refused or declined to comply with all or some or one and which of such requests. And that the said confederates may respectively come to a fair and just account with your orator, for what shall appear due to him from them and each of them on the balance of such accounts: Your orator hereby waving all penalties incurred by subtraction of such tithes, and being contented to accept the single value thereof. And that your orator may have such further and other relief in the premises as to your honours shall seem meet.

May it please, &c. &c. &c.

No. LVIII.—P. 385.

Subpœna to Appear and Answer in Chancery.

George the Third, by the grace of God, of the United Kingdom of Great Britain and Ireland, king, defender of the faith, and so forth, to Edward Willis and William Willis greeting, for certain causes offered before us in our chancery, we command, and strictly enjoin, you, that laying all other matters aside, and notwithstanding any excuse, you and each of you personally be and appear before us, in our said chancery, on the day of next, (or immediately on the receipt of this writ) wheresoever it shall then be, to answer concerning those things which shall be then and there objected to you, and to do further, and receive, what our said court shall have considered in this behalf, and this you may in no wise omit under the penalty of one hundred pounds, and have there this writ. Witness ourself at Westminster, the day of in the year of our reign.

COURTENAY.

Indorsed "by the court, to answer at the suit of James Willis *et al.*"
And upon the label—"To Edward Willis, to appear in chancery, returnable the day of at the suit of James Willis *et al.*"

Subpœna to Appear and Answer in the Exchequer.

George the Third, &c. To Edward Willis and William Willis, greeting, we command and strictly enjoin you, that all excuses apart you appear before the barons of our exchequer at Westminster, on the day of (or immediately after the return of this our writ,) to answer us concerning certain articles then and there on our behalf to be objected against you, and this in no wise omit, under the penalty of one hundred pounds, which we shall cause to be levied upon your goods and chattels, lands and tenements, to our use, if you neglect this our present command. Witness the Right Hon. Sir Archibald Macdonald, knight, at Westminster, the day of in the year of our reign.

ELIOT.

By the Barons,

Indorsed "at the suit of James Willis by bill." FOWLER.
Label—"to Edward Willis, returnable in the court of Exchequer at Westminster, on the day of next, (or immediately after the receipt hereof) at the suit of James Willis. By bill.

King's Remembrancer's Office,

F.

No. LIX.—P. 387.

A Letter Missive in Chancery.

My Lord,

It appears by a petition, a copy of which is herewith sent you, that James Willis an infant, has exhibited his bill in the high court of chancery against your lordship, and desires your appearance thereunto on the day of next: wherefore I do, at his request, (according to the manner used to persons of your quality) desire your lordship to take knowledge thereof, and to give orders to those you employ in such matters, for your appearance to the said bill accordingly.

I am,

Your Lordship's humble Servant, ERSKINE C.

To the Right Hon. Henry Earl of Cadogan.

A Letter Missive in the Exchequer.

To the Right Honourable Henry Earl of Cadogan.

May it please your Lordship,

After our hearty commendations to your lordship: whereas there is an English bill exhibited in his majesty's court of Exchequer at Westminster against your Lordship, by James Willis an infant: we have therefore thought fit to give your lordship notice thereof rather by these our letters, than by awarding his majesty's ordinary process against you; wherefore these are to pray your lordship to give order for the entering of your appearance on the day of next, and the putting in your answer according to the usual course with all convenient speed; of the which nothing doubting but that your lordship will have the care and regard which thereunto appertaineth, we bid your lordship heartily farewell.

Your Lordships very loving friends

ARCH. MACDONALD, A. THOMPSON.

Westminster, the first day of *July*, 1794.

No. LX.—P. 388.

An Attachment in Chancery.

George the Third, by the grace of God, of the United Kingdom of Great Britain and Ireland, king, defender of the faith, and so forth.

To the sheriff of Wiltshire, greeting: we command you to attach Edward Willis, so as to have him before us, in our court of chancery, wheresoever the said court shall then be, there to answer to us, as well touching a contempt, which he, as it is alleged, hath committed against us, as also such other matters as shall be then laid to his charge; and further to abide such order as our said court shall make in his behalf; and hereof fail not, and bring this writ with you. Witness ourselves at Westminster, the day of in the year of our reign. ARDEN, WINTER.

Indorsed, "by the court, at the suit of James Willis, for want of appearance, (or answer.)

Label—To the sheriff of Wiltshire. An attachment against Edward Willis for not appearing at the suit of James Willis, returnable in, &c.

An Attachment in the Exchequer.

George the Third, &c. to the sheriff of Wilts, greeting: we command you that you omit not, by reason of any liberty, but enter the same, and attach Edward Willis, by his body, wheresoever you shall find him in your bailiwick; and him safely and securely keep, so that you may have him before the barons of our Exchequer, at Westminster, on the day of next, to answer us concerning divers trespasses, contempts, and offences, by him lately done and committed; and that you then have there this writ. Witness the Right Hon. Sir Archibald Macdonald, knight, at Westminster, the day of in the 31st year of our reign. By affidavit, and by the barons.

ELIOT.

Indorsed "at the suit of James Willis, for want of appearance."

No. LXI.—P. 388.

An Attachment with Proclamations in Chancery.

George the Third, by the grace of God of Great Britain, France and Ireland, king, defender of the faith, &c. to the sheriff of Berkshire, greeting: we command you on our behalf, to cause public proclamation to be made in all places within your bailiwick, as well within liberties as without, wheresoever you shall think it most convenient, that Edward Willis do upon his allegiance on the day of personally appear before us, in our court of chancery, wheresoever it shall then be; and nevertheless, in the mean time, if you can find the said Edward Willis, attach him so as to have him before us, in our said court, at the time before mentioned, there to answer to us, as well touching a contempt, &c. (as in the single attachment.)

An Attachment with Proclamations in the Exchequer.

George, &c. To the sheriff of Berkshire, greeting: we command you, that you omit not by reason of any liberty, but enter the same, and make public proclamation in such places in your bailiwick as you shall think most convenient, that Edward Willis do, on pain of his allegiance which he oweth to us, personally appear before the barons of our Exchequer, at Westminster, on the day of next; and, in the mean time, omit not by reason of any liberty, but that you enter the same and attach, &c. (as in the single attachment.)

No. LXII.—P. 389.

A Commission of Rebellion in both Courts.

George the Third, by the grace of God, of the United Kingdom of Great Britain and Ireland, king, defender of the faith, &c. To Bamber Tyler, William Fowler, John Miller, and Thomas Porter, greeting: whereas, by public proclamations made on our behalf by the sheriff of Middlesex, in divers places of that county, by virtue of our writ to him directed, Edward Willis hath been commanded upon his allegiance to appear before us in our court of chancery, at a certain day, now past; yet he hath manifestly contemned our said command; therefore we command you jointly and severally to attach, or cause the said Edward Willis to be attached, wheresoever he shall be found, within our kingdom of Great Britain, as a rebel and contemner of our laws, so as to have him, or

cause him to be, before us in our said court, on, &c. wheresoever it shall then be; to answer to us, as well touching the said contempt, as also such matters as shall be then and there objected against him: and further to perform and abide such order as our said court shall make in that behalf: and hereof fail not. We also hereby strictly command all and singular mayors, sheriffs, bailiffs, constables, and other our officers and loyal servants and subjects, whomsoever, as well within liberties as without, that they, by all proper means, diligently aid and assist you, and every one of you, in all things in the execution of the premises. In testimony whereof we have caused these our letters to be made patent. Witness ourself at Westminster, the day of in the year of our reign. ARDEN, WINTER.

No. LXIII.—P. 389.

A Sequestration in Chancery.

George the Third, &c. To Samuel Leghorne, Peter Wilkins, Isaac Jones, &c. whereas James Willis, complainant, exhibited his bill of complaint to our court of chancery against Edward Willis and William Willis, defendants: and whereas the said Edward Willis, being duly served with a writ issuing out of our said court, commanding him under the penalty therein mentioned, to appear to and answer the said bill, has refused so to do, and thereupon all process of contempt has issued against him unto a serjeant at arms: and whereas the said Edward Willis hath of late absconded, and so concealed himself, that the serjeant at arms hath not been able to find him, as by the certificate of the said serjeant at arms appears: know ye, therefore, that we, in consideration of your prudence and fidelity, have given, and by these presents do give, to you, any three, or two of you, full power and authority to enter upon all the messuages, lands, tenements, and real estate whatsoever, of the said Edward Willis, and to take, collect, receive, and sequester into your hands, not only all the rents and profits of the said messuages, lands, tenements, and real estate, but also all his goods, chattels, and personal estate whatsoever: and therefore we command you, any three or two of you, that you do, at certain proper and convenient days and hours, go to, and enter upon, all the messuages, lands, tenements, and real estate of the said Edward Willis; and that you do collect, take, and get into your hands, not only the rents and profits of all his real estates, but also all his goods, chattels, and personal estate; and keep the same under sequestration, in your hands, until the said Edward Willis shall fully answer the complainant's bill, clear his contempts, and our said court make other order to the contrary. Witness ourself at Westminster, the day of in the year of our reign.

ARDEN, WINTER.

A Sequestration in the Exchequer.

George the Third, &c. To Samuel Leghorne, Peter Wilkins, and Isaac Jones. Whereas James Willis has lately exhibited his English bill of complaint before the chancellor and barons of our court of Exchequer, at Westminster, against Edward Willis and William Willis, defendants; and whereas the said Edward Willis, having been duly served with process of subpœna, issued out of and under the seal of our said court, to appear to, and answer the said bill, hath hitherto refused to appear thereto, and stands in contempt of our said court, all process of contempt

having issued out of our said court against the said Edward Willis; and, moreover, our serjeant at arms, attending our said court, hath made diligent search after the said Edward Willis, but hath not been able to find him, as by the certificate of our said serjeant at arms manifestly appears: know ye, therefore, that we, trusting to your fidelity, industry, and circumspection, have appointed you our commissioners; and, by these presents, do give unto you, or any two or more of you, full power and authority to enter upon and possess, all and singular the messuages, lands, tenements, and hereditaments, of him the said Edward Willis, and of taking and sequestering the same; and also all his personal estate, of what kind soever, into the hands of you, or any two or more of you: and therefore we command you, or any two or more of you, that at such time and place, or times and places, which you, or any two or more of you, shall appoint for that purpose, you do assemble, go to, and enter upon all and singular the said messuages, lands, tenements, hereditaments, and premises, of him the said Edward Willis; and, from time to time, take and sequester the same, and the rents and profits thereof; and also all his personal estate, of what kind soever, into the hands of you, or of any two or more of you, until the said Edward Willis shall have appeared to the said bill, and our said court shall have made further order therein. In witness whereof, we have caused these our letters to be made patent. Witness, &c. at Westminster, the day of in the year of our reign.

By order of court, made the same day, and by the barons. ELIOT.

No. LXIV.—p. 389.

The Form of a Writ of Assistance.

George the Third, &c. To the sheriff of Middlesex, greeting: we command you not to omit by reason of any liberty in your bailiwick, but enter the same, and assist A. B. C. D. and E. F. commissioners named in our writ of sequestration issued out of our court of chancery, and bearing date the day of 1806, at the suit of O. P. against Q. R. to do, collect, take, and get into their hands, not only the rents and profits of all the real estates of the said Q. R. but also all his goods, chattels, and personal estates, and keep the same under sequestration in their hands until the said Q. R. shall fully answer the complainant's bill, clear his contempt, and our said court make other order to the contrary. And this may be done at other times and oftener, as it shall be necessary. Witness ourselves at Westminster, the day of in the year of our reign.

No. LXV.—P. 390.

A Distringas in Chancery.

George the Third, &c. To the sheriff of the city of London, greeting: we command you to make a distress on the lands and tenements, goods, and chattels, of the mayor, commonality, and citizens of our said city of London, within your bailiwick; so as neither the said mayor, commonality, and citizens, nor any other person or persons for him, may lay his or their hands thereon, until our court of chancery shall make other order to the contrary; and, in the mean time, you are to answer to us for the said goods and chattels, and the said rents and profits, of the said lands, so that the said mayor, commonality, and citizens, may be compelled to appear before us in our said court of chancery, wheresoever it shall

then be, there to answer to us, as well touching a contempt, &c. (as in the attachment.) Witness, &c. ARDEN, WINTER.

A Distringas in the Exchequer.

George, &c. To the sheriff of the city of London greeting: we command you that you omit not, by reason of any liberty, but enter the same, and distrain the mayor, commonality, and citizens of our said city of London, by all their lands and chattels in your bailiwick, so that they, or any others, by their orders, lay hands on them, until you are otherwise commanded by us concerning the same, and that you answer to us the issues of the said lands, and have their bodies before the barons of our Exchequer at Westminster, on the day of next, to appear to and answer a certain English bill lately exhibited against them before the chancellor and barons of our said Exchequer, by James Willis, plaintiff, and that you then have there this writ. Witness, &c. at Westminster, the day of in the year of our reign.

ELIOT.

Indorsed, "at the suit of James Willis by bill."

FOWLER.

No. LXVI.—P. 392.

The joint and several Demurrer of Edward Willis and William Willis, two of the Defendants to the Bill of Complaint of James Willis, an infant, by his Father and next Friend, Complainant.

These defendants by protestation not confessing or acknowledging all or any of the matters in and by the said bill set forth and complained of to be true in manner and form as the same are therein and thereby set forth and alleged, severally say they are advised that there is no matter or thing in the complainant's said bill of complaint contained, good and sufficient in law to call these defendants to account in this honourable court for the same; but that there is good cause of demurrer thereunto, and they do demur thereunto accordingly, and for causes of demurrer say, that the complainants said bill of complaint, in case the same were true, which these defendants do in no wise admit, contains not any matter of equity whereon this court can ground any decree, or give the complainant any relief or assistance as against them these defendants: wherefore, and for divers other errors and defects in the complainant's said bill of complaint contained, and appearing on the face thereof, these defendants do, as aforesaid, demur in law thereunto, and humbly crave the judgment of this honourable court, whether they are compellable or ought to make any answer thereunto otherwise than as aforesaid; and these defendants humbly pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

A. STAINSBY.

No. LXVII.—P. 392.

The joint and several Plea of Edward Willis and William Willis, two of the Defendants to the bill of Complaint of James Willis, an Infant, by John Willis, his Father and next Friend, Complainant.

The said defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's said bill of com-

plaint contained to be true in such manner and form as the same are therein declared and set forth, do plead thereunto; and for cause of plea say, that heretofore, and before the said complainant exhibited his present bill of complaint in this honourable court; to wit, on the 9th day of February, which was in the year 1752, the said now complainant, together with John Willis his father, in the said bill named, did exhibit their bill of complaint in this honourable court against these defendants for the same matters, and to the same effect, and for the like relief and purpose as the said now complainant doth by his present bill demand and set forth; to which said first bill of complaint these defendants did put in their joint and several answers; and the said complainant thereunto did reply, and other proceedings were thereupon had; and the said former bill is still depending in this honourable court, and the matters thereof undetermined, and therefore these defendants do plead the said former bill, answer, and proceedings, in bar to the said complainant's present bill, and humbly pray the judgment of this honourable court, whether it behoves them to make any further or other answer thereunto than as aforesaid, and pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

A. STAINSBY.

No. LXVIII.—P. 393.

A General Replication to a Defendant's Answer.

In Chancery.

Between James Willis by his father and next friend, plaintiff, and Edward Willis and William Willis defendants.

The replication of James Willis, complainant, to the answer of Edward Willis and William Willis, defendants.

This repliant, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants, for replication thereunto, saith, that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in the law, to be replied unto by this repliant; without that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied is true: all which matters and things this repliant is ready to aver, maintain, and prove as this honourable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

No. LXIX.—P. 393.

The Answer in the Exchequer to the Bill in Bateman v. Aistrup.

The joint and several answer of the governors of the goods, possessions and revenues of the free grammar school of Robert Johnson, clerk; and of the hospitals of Christ in Oakham and Uppingham in the county of Rutland; and of Joseph Blackhith and Hurst Fowler, to the bill of complaint of Thomas Bateman, clerk, complainant.

These defendants reserving to themselves all advantage of exception to the many errors and untruths in the said bill contained, for answer unto

so much thereof as is material for them or any of them to make answer unto, they severally answer and say, they believe it to be true and do admit, that the complainant was at or about the time in the bill for that purpose mentioned, presented, instituted and inducted into the vicarage and parish church of Whaplode, as in the bill is mentioned; and these defendants believe that as vicar of the said vicarage he is intitled to several species of tithes arising, growing and increasing within the limits of the said vicarage and the titheable places thereof under some endowment; but as these defendants never saw the said endowment, they refer the said complainant to the same, when produced, and to such proof as he shall make thereof; but these defendants believe that under such endowment the said vicar is intitled to the tithe of cole-seed, and to the tithe of wool and lambs, from and under the number of five as in the bill is stated; and these defendants the governors of the goods, possessions and revenues of the free grammar schools of Robert Johnson, clerk, and of the hospitals of Christ in Oakham and Uppingham, in the county of Rutland, say, that they claim to be and are, as they doubt not to prove, lay rectors and impropriators of the parish of Whaplode, and as such intitled to all manner of tithes arising, renewing, or increasing within the same or the titheable places thereof, save only and except such tithes as the said vicarage is endowed with. And particularly these defendants claim to be intitled to all the tithes of corn and grain, wool and lambs, save as before is mentioned, hemp, flax, and an agistment tithe for all sheep sold out of the said parish, before the time of shearing, which have been agisted upon any lands in the said parish. And such agistment tithe as to all sheep sold between the second of February, on which day an account is usually taken of all sheep within the said parish, and the time of shearing, is, and for the time whereof the memory of man is not to the contrary, hath been, as these defendants believe, the sum of threepence for each sheep. And all these defendants say, that the said defendants the governors being as they verily believe intitled as aforesaid, did by indenture duly executed, bearing date on or about the 12th day of October 1769, and made between the said governors by description aforesaid, of the one part: and these defendants Joseph Blackhith and Hurst Fowler of the other part, demise unto both the said defendants Joseph Blackhith and Hurst Fowler, all that the rectory and parsonage impropriate of the parish church of Whaplode, in the county of Lincoln, and the chancel of the same; and the glebe land to the said rectory of Whaplode, aforesaid belonging; and also all manner of tithes of corn and grain, and all other tithes, profits, fruits, oblations, obventions, emoluments, and hereditaments whatsoever, to the said rectory and parsonage impropriate of Whaplode aforesaid, belonging or in any wise appertaining, or which shall belong or appertain thereunto, or have therewith been commonly used or enjoyed, with all and every the appurtenances thereof; excepting all timber trees and such yearly contributions of beans, commonly called parden beans, as have been usually paid and given to the poor by the farmers of the said parsonage; to hold the said rectory and parsonage, with the chancel, tithes, and all singular other the premises with the appurtenances, except as aforesaid unto these defendants Joseph Blackith and Hurst Fowler, their executors, administrators and assigns from the tenth day of the said month of October, called old Michaelmas-day then last past, for twenty one years at and under the yearly rent of 356 *l.* And these defendants say that they do not know nor ever heard that any agistment tithe hath ever been paid within the said parish or the titheable places thereof for any unprofitable cattle, save as aforesaid, to any person whatsoever; but as such agistment

tithe is due of common right, these defendants respectively as lay rector and impropriators and as their lessees, claim to be and are as they were advised intitled to the same, unless the said complainant can make out a title thereto, of which title, if such there be, these defendants are wholly unapprized. And these defendants do not know whether any lands within the said parish are exempt from the payment of tithes, though they say that certain lands claim an exemption, and are called tithe-free lands, but how such exemption is made out these defendants know not. And these defendants believe that the defendants Samuel Aistrup, Robert Collins, Robert Goulding, John Speechley, James Watson and John Watson, have respectively occupied lands within the said parish, and had titheable matters thereon. But as to the quantity of land occupied by them respectively, and the time during which they have severally occupied the same, and several species and quantities of titheable matters and tithes arising therefrom, these defendants crave leave to refer to the answer of the said last-named defendants touching the same. And these defendants deny all manner of combination and confederacy in the bill charged without that, that there is any other matter or thing in the complainant's bill of complaint contained material or effectual for these defendants to make answer unto, and not herein and hereby sufficiently answered, confessed or avoided, traversed or denied is true to the knowledge and belief of these defendants. All which matters and things these defendants are ready to aver and prove as this honourable court shall award; and humble pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained, &c. &c.

No. LXX.—P. 393.

The Disclaimer of Samuel Dickenson, one of the Defendants to the Bill of Complaint of James Willis, an infant, by John Willis, his Father and next friend, Complainant.

This defendant saving and reserving to himself now, and at all times hereafter, all manner of advantage and benefit, of exception and otherwise, that can or may be had and taken, to the many untruths, uncertainties, insufficiencies, and imperfections in the said complainant's said bill of complaint contained, for answer thereunto, or unto so much and such part thereof as is material for this defendant to make answer unto, he answereth and saith, that he this defendant doth fully and absolutely disclaim all, and all manner of right, title, interest, and claim whatsoever in and to the legacy of 800*l.* in the complainant's said bill of complaint mentioned, and all other the estate and effects of the said Thomas Atkyns, deceased, in the said bill of complaint named, and in and to every part thereof: and this defendant doth deny all and all manner of unlawful combination and confederacy unjustly charged against him in and by the said complainant's said bill of complaint, without that any other matter or thing in the said complainant's said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this defendant is ready to aver, maintain, and prove, as this honourable court shall award, and humbly prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

No. LXXI.—P. 400.

Exceptions to an Answer in the Courts of Chancery and Exchequer.

In Chancery.

Between James Willis, by John Willis his father and next friend, complainant, and Edward Willis and William Willis, defendants.

Exceptions taken by the said complainant to the answer put in by the said defendants to the complainant's bill of complaint in this cause.

First—For that the said defendants have not, according to the best of their respective knowledge, information, and belief, set forth and discovered in their said answer, whether the said testator, Thomas Atkins, in the complainant's said bill named, duly made and executed such last will and testament, in writing, of such date, and of such purport and effect, as in the said bill mentioned, &c. [pursuing the words of such interrogatories of the bill as are not sufficiently answered.]

Secondly—For that the said defendants have not, according to the best of their knowledge, information, and belief, answered and set forth whether the said complainant hath or hath not, by his said father and next friend, applied to the said defendants, &c. &c. or how otherwise.

In all which, and divers other particulars, the said complainant is advised, and humbly insists, the answer of the said defendants is altogether evasive, imperfect, and insufficient: Wherefore the said complainant doth except thereto, and humbly prays that the said defendants may be compelled to amend the same, and put in a full and sufficient answer to the complainant's said bill.

A. MANNING.

No. LXXII.—P. 401.

Form of Exceptions to a Master's Report.

"In chancery, between A. B. plaintiff,
C. D. defendant.

"Exceptions taken by the said complainant to the report of John Ord, Esq. one of the masters of this court, made in this cause, and bearing date the 20th day of January, 1790.

"*First Exception.*—For that the said master hath in and by his said report stated, &c.

"*Second Exception.*—For that the said master hath in and by his said report certified, That, &c.

"In all which particulars, the said complainant doth except to the said master's said report, and humbly appeals therefrom to the judgment of this honourable court."

No. LXXIII.—P. 402.

Form of a general Replication.

"Between A. B. plaintiff,
C. D. defendant.

"The replication of A. B. complainant to the answer of C. D. defendant.

"This repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith, that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the defendant is uncertain, untrue, and insufficient to be re-

plied unto by this repliant, without that, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honourable court shall direct, and humbly prays as in and by his said bill he hath already prayed."

Form of a Special Replication.

Michaelmas term in the 34th year of the reign of King *George* the Third.

Filed 12th Nov. 1793.

Fowler.

The replication of A. B. plaintiff, to the answer of C. D. defendant.

The said repliant saving and reserving to himself all benefit of exception that may be had and taken to the answer of the said defendant, for and by way of replication thereunto saith, that he, this repliant, doth, in and by this his replication, wave his demands of tithes of wool and lamb, and likewise of Easter-offerings demanded by his bill, and in the said defendant's answer mentioned; and doth in no sort insist thereupon, or require or intend any examination of witnesses in this cause of or concerning the same, and only insisteth upon his other demands made in and by his said bill; and that he doth and will aver, justify, maintain, and prove his said bill, as to all the demands therein contained (except as to such demands as are herein before waved,) to be just and true, certain, and sufficient in the law to be answered unto by the said defendant; and that the answer of the said defendant is very untrue, uncertain, and insufficient in the law to be replied unto by this repliant for divers manifest errors and uncertainties therein contained, without that, that any other matter or thing in the said replication contained, material or effectual in the law for this repliant to reply unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true: All which matters and things this repliant is ready to aver and prove, as this honourable court shall award, and prayeth as in and by his said bill he hath already prayed, except as herein-before excepted.

J. S.

No. LXXIV.—P. 403.

Forms of Rejoinder.

"The rejoinder of C. D. and E. F. defendants, to the replication of A. B. complainant.

"The said defendants now and at all times hereafter, saving and reserving to themselves all and all manner of benefit and advantage of exception to the incertainty and insufficiency of the said replication, they and each of them, saith, That the defendant's said answer is certain, true, and sufficient in the law to be replied unto; and they also say, as in and by their said answer they have already said, and do and will aver and maintain, all and every thing and things therein to be true and certain, in such manner and form as they and every of them are therein alledged and expressed."

Or thus:

——"The said defendant rejoineth, and saith, in all and every thing as in and by his said answer he hath already said, and doth and will aver, maintain, and prove the same, and all and every thing and things, clauses and allegations therein contained, to be true and sufficient in the law to be replied unto, in manner and form as the same are in the said answer already

set forth and declared. And this defendant further saith, That the said replication of the said complainant is very uncertain, untrue, and insufficient in the law to be rejoined unto by this defendant, for divers defects and imperfections therein contained, and that the same is so contrived and made, to the end to give some feigned colour to maintain the said bill in this honourable court, to the unjust vexation of this defendant. In that the said complainant, by the ill practices and sinister designs of one R. T. who as it is said, prosecuteth the said suit for the said complainant against this defendant, did, contrary to equity and good conscience, procure this defendant, an ignorant illiterate man, to become bounden by obligation, in the said replication mentioned, with the condition whereof this defendant is utterly ignorant, the same having never been read to him. Without that, that there is any other matter or thing in the said replication contained material or effectual in the law to be rejoined unto by this defendant, and not herein and hereby well and sufficiently rejoined unto, by this defendant, and not herein or hereby well and sufficiently confessed and avoided, traversed or denied, is true. All and every of which matters this defendant is ready to aver and prove, as this honourable court shall award, and therefore prayeth, as he before in his said answer hath already prayed."

W. BOOTLE.

No. LXXV.—P. 403.

The Form of a Commission to examine Witnesses.

"*George* the Third, &c. To greeting: Know ye, that we, in confidence of your prudence and fidelity, have appointed you, and by these presents do give unto you, any three or two of you, full power and authority, diligently to examine all witnesses whatsoever upon certain interrogatories to be exhibited to you, as well on the part of A. B. complainant, as on the part of C. D. defendant, or of either of them; and therefore we command you, any three or two of you, that at certain days and places to be appointed by you for that purpose, you do cause the said witnesses to come before you, and then and there examine each of them apart upon the said interrogatories, on their respective corporal oaths first taken before you, any three or two of you, upon the Holy Evangelists; and that you do take such their examinations, and reduce them into writing on parchment; and when you shall have so taken them, you are to send the same to us in our chancery wheresoever it shall then be, closed up and under your seals, or the seals of three or two of you, distinctly and plainly set, together with the said interrogatories, and this writ. And we further command you, and every of you, that before you act in or be present at the swearing or examining any witness or witnesses, you do severally take the oath first specified in the schedule hereto annexed; and we do give you, any three, two, or one of you, full power and authority, jointly or severally, to administer such oath to the rest, or any other of you, upon the Holy Evangelists. And we further command, that all and every the clerk or clerks, employed in taking, writing, transcribing or engrossing the deposition or depositions of witnesses to be examined by virtue of these presents, shall before he or they be permitted to act as clerk or clerks, as aforesaid, or be present at such examination, severally take the oath last specified in the said schedule annexed: And we also give you, or any one of you, full power and authority, jointly and separately to administer such oath to such clerk or clerks upon the Holy Evangelists. Witness ourself at Westminster, the day of in the year of our reign.

ARDEN, HANMER."

Indorsed, "*By order of court.*"

Label. "To (*insert commissioners*) any three or two of them, a commission to examine witnesses as well on the part of A. B. plaintiff, as on the part of C. D. defendant, returnable on fourteen days notice to defendant.

ARDEN, HANMER."

The Oath of the Commissioners.

"You shall, according to the best of your skill and knowledge, truly, faithfully, and without partiality to any or either of the parties in this cause, take the examinations and depositions of all and every witness and witnesses produced and examined by virtue of the commission hereunto annexed, upon the interrogatories now produced, and left with you. And you shall not publish, disclose or make known, to any person or persons whatsoever, except to the clerk or clerks by you employed and sworn to secrecy in the execution of this commission, the contents of all or any of the depositions of the witnesses, or any of them, to be taken by you and the other commissioners in the said commission named, or any of them, by virtue of the said commission, until publication shall pass by rule or order of the high court of chancery. So help you God."

The Clerk's Oath.

"You shall truly, faithfully, and without partiality to any or either of the parties in this cause, take and write down, transcribe and ingross, the depositions of all and every witness and witnesses produced before and examined by the commissioners, or any of them named in the commission hereunto annexed, as far forth as you are directed and employed by the said commissioners, or any of them, to take, write down or ingross the said depositions, or any of them. And you shall not publish, disclose or make known, to any person or persons whatsoever, the contents of all or any of the depositions of the witnesses, or any of them, to be taken, wrote down, transcribed or ingrossed by you, or whereto you shall have recourse, or be any ways privy, until publication shall pass by rule or order of the high court of chancery, So help you God."

The Oath of the Witnesses.

"You shall true answer make to all such questions as shall be asked of you upon these interrogatories, without favour or affection to either party; and therein you shall speak the truth, the whole truth, and nothing but the truth. So help you God."

The Form of a Subpœna to testify.

"*George* the Third, &c. To Simon Thelwal, greeting. We command and strictly enjoin you, that laying all other matters aside, and notwithstanding any excuse, you personally be and appear before Isaac Bromley (one of the commissioners,) and others, commissioners appointed in our chancery, at such times and places as the bearer hereof shall appoint, to testify the truth in a certain cause depending in our said court on the behalf of Jonathan Simpson; and this you may in no wise omit, under the penalty of 100*l.* Witness ourself at Westminster the 10th day of July in the 29th year of our reign."

Indorsed, "*By the court.*"

Label: "Simon Thelwal to appear before Isaac Bromley and others, commissioners, at such times and places as the bearer hereof shall appoint, to testify on the behalf of Jonathan Simpson."

For the "*Form and Nature of Interrogatories*," vide Appendix, No. LXVI.

The Form of taking Depositions in a Commission.

The names and additions of the witnesses, and their depositions or answers to the interrogatories, are thus set down:

A. B. of in the county of gent. aged years and upwards, being produced, sworn, and examined as a witness on the behalf of the plaintiff (or defendant) deposeth as followeth.

To the first interrogatory this deponent saith, that, &c.

To the second interrogatory this deponent saith, that, &c.

And in like manner proceed through the rest of the interrogatories.

No. LXXVI.—P. 405.

Form of the Writ of Subpœna to hear judgment.

George, &c. To *A. B.* greeting: we firmly injoin and command you that, all excuses ceasing, you do personally be and appear before the chancellor and barons of our exchequer at Westminster, in the court of the chamber of the said exchequer, on the day of next, to hear the judgment of the said chancellor and barons there, in a certain cause now there depending by English bill (or English information), wherein J. S. is plaintiff, and you, the said A. B. and others, are defendants (or wherein our attorney-general, on our behalf, is informant, and you the said and others, are defendants), and hereof you are not to fail, on pain of 100*l.* which we shall cause to be levied on your goods and chattels, lands and tenements, to our use, if you neglect to obey this our command: witness the right honourable sir Archibald Macdonald, knight, at Westminster, the day of in the year of our reign. By the barons.

No. LXXVII.—P. 408.

Form of a Petition for a Rehearing.

To the right honourable, &c.

A. B. quer.

C. D. def.

The humble petition of the defendant,

Sheweth,

That your petitioner finds himself much aggrieved by a decretal order made in this cause, the day, &c. by, &c. whereby your petitioner is ordered and decreed to pay unto the plaintiff the sum of 500*l.* by. &c. next, with interest for the same, from the time of the said hearing until the money be paid; which sum of 500*l.* or the greatest part thereof, having been long since paid, and proof thereof made, as your petitioner conceives, and is advised;

Your petitioner humbly prays, that your lordship will be pleased to vouchsafe a rehearing in this cause before your lordship, he submitting to pay what costs the court shall award, in case his complaint be found groundless.

And, &c.

No. LXXVIII.—P. 409.

Form of a Writ of Injunction.

George the Third, by the grace of God, of the United Kingdom of Great Britain and Ireland, king, defender of the faith, and so forth; to his counsellors, attornies, solicitors and agents, and every of them, greeting. Whereas it hath been represented unto us, in our court of chancery, on the part of complainant, that he hath lately exhibited his bill of complaint into our said court of chancery against you the said , defendant, to be relieved touching the matters therein contained; and that you the said defendant being served with a writ, issuing out of our said court, commanding you to appear to and answer the said bill, *have not obeyed the same but are in contempt to an attachment for not appearing to and answering the said bill*; and yet in the mean time you unjustly, as is alledged, prosecute the said complainant at law, touching the matters in the said bill complained of: we therefore, in consideration of the premises, do strictly injoin and command you the said and all and every the persons before mentioned, under the penalty of two hundred pounds, to be levied on your and every of your lands, goods and chattels to our use, that you and every of you do absolutely desist from all farther proceedings at law against the said complainant, touching any of the matters in the said bill complained of, until you the said defendant shall have fully answered the said bill, cleared your contempt, and our said court shall make other order to the contrary: but nevertheless, the said defendant is at liberty to call for a plea, and to proceed to trial thereon; and, for want of a plea, to enter up judgment; but execution is hereby stayed. Witness ourself at Westminster this day of in the year of our reign.

No. LXXIX.—P. 411.

Form of a Petition to the Lords on Appeal.

Between A. B. plaintiff,
C. D. defendant.

To the Right Honourable the Lords Spiritual and Temporal in Parliament assembled.

The humble Petition and Appeal of the plaintiff A. B.

Sheweth,

That M, &c. [Set forth your case.]

That your petitioner some time in or about term, exhibited his bill in the high court of chancery against the said C. D. to be relieved, &c. [Set forth the prayer of the bill.] To which bill the said C. D. appeared and answered, and thereby insisted that, &c. [Set forth such parts of the answer which he insisted upon against the plaintiff's bill.]

That your petitioner having replied to the said answer, and the said defendant having rejoined, the said cause was at issue, and divers witnesses being examined on both sides, the same came on to be heard before the lord chancellor of Great Britain the day of 17 when although the said C. D. had by his answer expressly sworn, &c. [The reasons admitted by his answer, and for which you appeal,] yet his lordship was pleased to decree that, &c. [Set forth the decree, and if there were any subsequent proceedings before the master, or the like, set them forth briefly.]

That your petitioner is advised the said decree (and subsequent orders) are erroneous, and humbly appeals therefrom to your lordships.

Your petitioner therefore humbly prays your lordships to grant to your petitioner your lordships' order of summons to the said C. D. to put in his answer to this your petitioner's appeal at such time as your lordships shall prefix, in order that your lordships may hear the said cause, and that your lordships will be pleased to reverse the said decree (and subsequent orders) in the said cause or grant to your petitioner such relief in the premisses as to your lordships in your great wisdom shall seem meet.

And your petitioner shall ever pray, &c.

A. B. (the Appellant.)

G. H. } Counsel.
J. K. }

No. LXXX.—P. 411.

Form of a Respondent's Answer to an Appeal to the House of Lords.

The Answer of C. D. to the petition and appeal of A. B.

This respondent, not confessing or acknowledging all or any of the matters or things to be true, as in and by the said petition and appeal are mentioned and set forth, for answer thereunto, saith, that he believes it to be true that such decree (and subsequent orders) as are complained of, were made by the court of chancery as in the said petition and appeal are mentioned and set forth: but as to the dates, substance and contents thereof, this respondent humbly craves leave to refer thereunto, when the same shall be produced; and this respondent humbly conceives and is advised that the said decree (and subsequent orders) are agreeable to equity and justice, and therefore humbly hopes that the same shall be affirmed, and that the said petition and appeal shall be dismissed this most honourable house with costs.

L. M. (Counsel.)

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